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Supreme Court of the United States

OCTOBER TERM, 1900.

Filed April 4, 1901.

MICHAEL W. O'BRIEN, et al., Executors,
Complainants and Appellants,
vs.
JOHN G. WHEELOCK, et al.,
Defendants.

No. 241.

Certiorari to the U. S. Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF HENRY M. DUFFIELD,

Counsel for Complainants.

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STATEMENT OF CASE.

Complainants are the executors of the last will of Francis Palms, deceased, of the City of Detroit, and are citizens of the State of Michigan and the defendants, who number about one thousand, are respectively citizens of the States of Illinois, Missouri and other states of the United States than the State of Michigan.

By leave of the Circuit Court of the United States for the Southern District of Illinois, in Equity, they filed a bill in the nature of a bill of revivor and supplement under which the proceedings therein and in the United States Circuit Court of Appeals for the Seventh Circuit hereinafter stated were had.

Character of Complainants' Bill.

The case grows out of the construction of a levee across the Sny Cartee Slough and along the banks of the Mississippi river, in the State of Illinois, from a point in the Township of Fall Creek, Adams county, through Pike county, terminating in Hamburg township in Calhoun county, a distance of about fifty-two miles, and with a height up to the high water mark of the Mississippi river of 1851. The levee has, during and since its construction, been at all times in the possession and custody of the defendants and their ancestors and assigns through commissioners of their own choosing. It has remained unbroken since 1888, and has grown as solid and secure as a natural river bank. Under the protection of this levee more than one hundred thousand acres of land which, before the levee was built were not worth on an average fifty cents an acre, have become worth ten to twenty-five dollars and upwards, and yield most bounteous harvests, one year's crops of which would more than pay the entire cost of the levee.

Complainants' bill seeks to enforce severally against defendants' lands certain special assessments levied thereon for the cost of constructing said levee under the provisions of an act of the Legislature of the State of Illinois, hereinafter stated.

The theory and scope of the bill is similar to those sustained by this Court in Fitch vs. Creighton, 24 How., 159, and Hagar vs. Reclamation District, 111 U. S., 701, referred to hereinafter.

The bill implies the possibility, and the evidence shows, in case the Court should declare the 1871 drainage law of Illinois hereinafter referred to unconstitutional, that some of the assessments may not be collectible because the land owners in those cases have not by their conduct or acts estopped themselves to deny the invalidity of the statute. On this account the original bill filed by

Character of Complainants' Bill—Lists of Typical Defendants.

Mr. Palms listed separately in the bound book, Exhibit "A," each description of land assessed, the name of the owner, and the amount of the assessment.

In the present bill complainants in Exhibit "X" list the same descriptions of land, the same assessments thereon, and the names of the owners at the date of the assessment as in Exhibit "A," with the addition of the names of the owners at the time of filing this bill. The changes in title are proven by admissions of defendants and by carefully prepared abstracts of title (Record, p. 377), introduced in evidence under a stipulation that they may be received with the same force and effect as the deeds referred to in them (Record, p. 113).

While the proofs are sufficiently full and explicit, to point out and authorize a decree in detail against each of the particular descriptions of lands of the several defendants, whom the Court may find estopped to attack the validity of the assessment, it would involve a detailed examination of the testimony, which is very voluminous. Believing this to be the appropriate function of a master under an order of reference declaring the rule of liability, counsel did not ask it of the Court below, but submitted short lists of certain typical defendants, whom they claimed to be estopped, with the several descriptions of their lands and the amounts of the respective assessments thereon and a brief statement of the act of estoppel relied upon. (Exhibit A to this brief gives a copy of such lists.)

The assessments which are sought to be enforced, and from the proceeds whereof complainants ask the payment of the bonds held by them, were levied under the provisions of an act of the General Assembly of the State of Illinois, approved April 24, 1871, entitled, "An act to provide for

the construction and protection of drains, levees and other works.

The act is printed in full in the record, pp. 394 to 404.

Its provisions are stated in the opinion of the Circuit Court of Appeals, Record, pp. 511-517, and a copy is hereto annexed, marked Exhibit "B."

It is sufficient here to state that the act provided a mode by which drains, ditches, levees and other works which were necessary for sanitary or agricultural purposes might be, constructed upon petition of land owners and occupants, by means of the formation of drainage and levee districts and other proceedings in the country courts of Illinois and paid for out of the proceeds of assessments upon the several descriptions of lands benefited.

The act is carefully framed. It requires damages to be *paid* before taking lands for the work; gives resisting land owners, a hearing before court and jury on all material questions, and affords every safeguard against injustice.

Section 27 of the act provides that when the Court shall confirm the assessments of benefits by the jury it may order the whole amount to be paid immediately or to be paid in installments, "and said assessments shall be a lien on the lands assessed until paid."

Section 35. Empowers the commissioners to borrow money for the construction of the work and give therefor notes or bonds, drawing interest not exceeding ten per cent, "which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon

the assessments for the repayment of the principal and interest thereon."

Section 39 provides: "Any one or more new assessments may be made in the manner hereinbefore provided, on the suggestion of the commissioners—or any owner or occupant of lands affected by the work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter or enlarge, cleanse, protect or maintain any drain, ditch, levee or other work, constructed by virtue of this chapter."

Under Section 35, above quoted, "bonds"* were issued by the commissioners of the Sny Levee Drainage District in 1872 and 1875—$499,500 under the assessment of 1872, and $148,500 of the issue under the second assessment of 1875. (Record, p. 81.)

Mr. Palms, relying on the good conscience and sense of justice of the land owners who would be benefited by said levee, and the statute which they held out to him through the levee commissioners, purchased $202,500.00 of the bonds issued in 1872 (Record, p. 372).

Interest was paid to Mr. Palms on these bonds for the years 1873 and 1874 (Record, p. 372).

Relying upon the above facts and the fact that the land holders generally had paid their interest assessments for 1872, 1873 and 1874,

Testimony of Defendants; Shewe, Rec., p. 301; Abram, Rec., p. 297; Roberts, Rec., p. 285; Elliott, Rec., p. 291.

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*These are not bonds in a strict sense, but are in legal effect similar to the instruments in New Orleans vs. Warner, 175 U. S., 120.

Description of Lands Protected by Levee.

Mr. Palms purchased the entire $148,500.00 of bonds issued in 1875—under a subsequent assessment, to supply a deficiency in the issue of 1872. It is proven beyond dispute that the location and construction of the levee was paid for by the proceeds of these and other bonds issued by the commissioners. (Record, p. 81.)

The several tracts of land described in Exhibit "A" constituted a body of land of an average width of from three to five miles, extending fifty-two miles from the mouth of Fall Creek, in Adams County, to Hamburgh Bay, along the east bank of the Mississippi, and between it and the bluffs or high water mark of the river, containing one hundred and ten thousand acres. They included the greater part of several congressional townships, and if reclaimed and protected from periodical overflows of the Mississippi River, would be fertile and healthy.

The map of the improvement attached hereto, marked Exhibit "D," is a copy of the one made under the charge of the chief engineer of the commissioners, found in the record between pages 384 and 385, showing the course of the levee and the surrounding lands.

From their proximity to the river and to the City of Quincy, a few miles north, and the cities of Hannibal, Louisiana and Clarksville, and the valuable cultivated lands in the neighboring region of Illinois and Missouri, they had attracted in an unusual degree the attention of persons seeking homes and others seeking speculative investments. While these bottom lands were sparsely populated, many persons residing on the high lands in the counties of Adams, Pike and Calhoun, in Illinois, and in the cities of Hannibal, Louisiana and Clarksville, in Missouri, had bought large bodies of said lands, expecting they would be reclaimed and protected by levees and be made productive and greatly increased in value.

Effect of the Building of the Levee Upon the Lands.

Before the levee was built the bulk of the bottom lands within its lines was in a wild and unimproved condition.

Defendant Clark's testimony, Rec., p. 109.

After its completion in 1875 they were at once cultivated extensively and most successfully. Crops in 1876 had increased ten times as much as in 1872.

Defendant Clark's testimony, Rec., p. 119.

In 1876 there were more than fifty thousand acres in wheat worth ten dollars or more an acre. Defendant Fesler in 1876 had two hundred acres in wheat which would go thirty bushels to the acre.

Testimony of Defendant Fesler, Rec., p. 169.

The crop of 1880 was one thousand acres of wheat worth ten to twelve dollars an acre and forty thousand acres of corn worth ten dollars an acre. In 1881 the corn crop was worth seven hundred thousand dollars and the wheat two hundred and fifty thousand dollars.

Testimony of Defendant Gay, Rec., pp. 157, 158.

Defendant Massie (Rec., p. 205) estimates crop of 1876, ten thousand acres in wheat at eighteen bushels to the acre at 70c. a bushel, $126,000; corn, eight thousand acres at thirty bushels to the acre and 20c. a bushel, $48,000; aggregate, $174,000.00. In 1881 he estimates crops were worth $500,000. In 1888 he estimates crops, wheat, $504,000; corn, $180,000, aggregating $684,000. These figures are corroborated by Defendant John H. Bramwell (Rec., p. 314).

Speaking of the crops in 1880, Defendant Murray, one of the drainage commissioners under the new drain-

age district of 1880, says: "In 1880 I went across the bottom in all directions. Everything was in wheat. As fine a prospect as I ever saw. Corn was splendid, sixty to sixty-five per cent of the district in cultivation. Would think that the wheat would yield from sixty to sixty-five bushels to the acre, about $1.00 a bushel" (Rec., p. 122).

Defendant Prince thus describes the effect of the building of the levee before the first break: "Everybody got rich; one man paid ten dollars an acre, another twenty, thirty, forty, fifty, anywhere. Too valuable to be transferred, a kind of Garden of Eden. I made a little money by buying at $100.00 and selling at $300.00."

Testimony of Defendant Prince, Rec., p. 143.

Defendant Clark "was buying, selling and handling land. Values increased to 1876 a great percentage. Land was worth at one time $12.00 more an acre. * * * Everything was booming."

Testimony of Defendant Clark, Rec., p. 119.
Testimony of Defendant Fesler, Rec., p. 171.

In a general way lands advanced probably $1,009,000.

Testimony of Defendant Clark, Rec., p. 246.

The protection of these lands by levees had, for many years before the passage of the act of April 24th, 1871, been the subject of consideration and discussion among the owners and occupants thereof as well as among those who knew their condition and their prospective value, and several ineffectual attempts to construct a levee had been made, so that before the passage of the act of April 24, 1871, owners and occupants of and persons interested in said lands well knew that an act of the Legislature of the State of Illinois was absolutely necessary under the pro-

visions of which the owners and occupants of the lands could be united and a common agency created and authorized to make all necessary plans, estimates and contracts for the construction of a levee, and to borrow money therefor by the issue of bonds or otherwise, to be secured and paid by assessments on or pledges of the lands benefited.

It resulted that during the session of the Legislature of Illinois in 1870 and 1871, the defendant Charles N. Clark, with money advanced for the payment of his expenses by other defendants named, and with the knowledge and approval of very many if not all the then known occupants and owners of said lands, procured the passage of the act of April 24th, 1871, by Legislature of the State of Illinois, under which said owners and occupants believed and expected the reclamation and protection of said lands would be effected. (Clark's testimony, Record, p. 58 et seq., 77 et seq.) Immediately after the passage of said act the defendants, who were the owners and occupants of lands described in said Bound Book Exhibit "A," availed themselves of the provisions of the act and for the information of all interested caused it to be published at length, or in its substantial parts, in the Hannibal Courier and Pike County Democrat and other newspapers which were published and circulated in the cities of Quincy, Hannibal and Louisiana, and Clarksville and Pittsfield, and also had a large circulation among the owners and occupants of said lands. In addition to these publications, public meetings, called and extensively advertised by Clark and others named in the proofs, were held at various prominent points in the district of lands intended to be reclaimed and protected, and in its immediate neighborhood. At these meetings, which were largely attended, Clark and others inter-

ested read and explained the provisions of the act of April 24th, 1871, which were approved and accepted by the owners and occupants of said lands, and they devised a plan for the organization of a corporation by them, called the Mississippi Levee and Drainage Company, with a capital stock of $100,000 to raise the money to put said act into effect. (Clark's testimony, ubi sup.)

By the means above mentioned all of the owners and occupants of the lands and the persons interested in them were fully informed of the passage of the act and of the steps being taken under its provisions for the reclamation and protection of the lands. Many of the then owners and occupants of lands who are defendants to this suit are shown by the proofs to have organized and subscribed to the capital stock of this organization as shown by the Articles of Association and list of subscribers, which are in the proofs. (Transcript, p. 2124.)

Acting under these laws, certain of the defendants, within the provisions of the act of 1871, filed at the August term, 1871, of the County Court of Pike County, a petition under said act (a copy of which is given, Record, pp. 442-447), in all respects conforming to the requirements thereof, and praying for the appointment of commissioners in the premises. Due notice of the filing of such petition was given, and at its September term, 1871, the said County Court of Pike County found that the proposed work was necessary and useful for the drainage of the lands, and appointed William Dustin, George W. Jones and John G. Wheelock, Commissioners, who duly qualified and organized as the Sny Island Levee Commissioners. (Record, p. 79.)

On the 23rd of November, 1871, these Commissioners filed a full report, answering all the requirements of the statute, accompanying it with the surveyor's estimates

and report, the map of the district, a copy of which is attached to this brief, Exhibit "D," and the profile of the work to be done, made by a competent engineer.

At the December term, 1871, of said Pike County Court, due proof of notice to all concerned was made, and the report of the Commissioners *was duly approved and confirmed without objection by anyone* (Rec., p. 391). A jury was ordered impaneled and duly sworn to examine the lands, assess the damages and benefits, and make out a proper assessment roll. (Record, pp. 79 and 391. Profiles are in transcript, but under stipulation not printed.)

The order summoned a jury of 12, although the act only required a jury of 6. This cured any objection to that provision in the act. (Campau vs. Detroit, 14 Mich., 376.)

The proceedings of the jury were regularly had upon due notice to all the parties interested, their report and assessments were filed with the Court, and spread upon the record. Certain appeals were taken from these assessments, but all the others were confirmed.

The Court directed that the assessments be paid in ten annual installments, commencing in 1882 with interest from the first day of October, 1872.

Certified copies of said order for Pike, Adams and Calhoun Counties, were made by the Commissioners and were recorded in said counties on or before December 18th, 1872. The Commissioners acquired the title to the lands required for the site of the levee, and in reliance upon said assessments, contracted for the construction and completion of said levee, issued bonds under an order of the Court to the amount of $499,500 and used them to construct the levee. The complainants' testator

purchased $202,500.00 of said bonds. (Testimony of Geo. W. Jones, Commissioner, Record, p. 81.)

It became necessary to raise an additional sum to complete the levee and a second petition was filed and proceedings similar to the first were had thereon, resulting in additional assessments of $148,500 (Record, p. 81), which were made payable in 1892, 1893 and 1894 (Book Exhibit "10"). Upon these assessments the Commissioners issued under orders of Court and sold to the complainants' testator through the contractors who built the levee, bonds to the amount of $148,500.00 and expended the same in the construction and completion of said levee. The complainants' testator purchased said bonds, relying on the facts before mentioned and upon the further fact that the Commissioners had paid the interest for the years 1873 and 1874 on the bonds which he held.

The levee as constructed cut off at one point the outlet of a stream, upon which Shaw & Rupert had a mill site and were operating a mill, naturally destroying their water power and being a damage to them. They commenced legal proceedings in the Federal Court in Illinois to abate the levee at that point, and a decree was rendered in their favor by Judge Drummond. In order to avoid the decision the levee commissioners and certain of the land owners agreed upon a sum in settlement of the claim of Shaw & Rupert and adjusted the matters in difference. This litigation and its settlement was a matter of intense local interest and wide notoriety, and for a time strained the relations between the commissioners and land owners, because the commissioners purposed to carry out Judge Drummond's decree and break out the levee at its

crossing of the stream unless Shaw & Rupert were made good.

The contractors constructed the levee upon the location chosen by the levee commissioners in accordance with their contract and the plans and specifications and surveys of the commissioners, to the approval of the engineer in charge, who by the contract (Rec., p. 366) was made sole referee of all questions arising thereunder (testimony of Jones ubi sup.; E. L. Corthell, Record, p. 365; H. W. Parkhurst, Record, p. 344) to such a height that the lands were protected from overflow by the Mississippi River and were reclaimed and rendered healthy and productive.

The levee was completed in May, 1875 (Rec., p. 369), the commissioners using for a part of it the railroad embankments of the Chicago & Alton and Chicago, Burlington & Quincy Railroads.

After the completion of the levee the commissioners, perhaps for lack of funds, did nothing to protect, maintain or repair the levee, which, being new, was particularly subject to injury from the action of the elements, wave action and the burrowing of animals. Because of this want of care the high water of April, 1876, caused a break at the head of the Sny and a more extensive one through the railroad embankments nearly opposite Hannibal.

The Commissioners had made after 1875 some effort to collect some installments of interest on said assessments, under an act of 1872 providing for the collection of said assessvenhs "in the same manner as State and County taxes" which were resisted by certain land owners, and in January, 1876, the Supreme Court of Illinois, after said levee was wholly constructed,

refused to enforce their collection on the ground that the act of 1871 was unconstitutional because it was not within Section 31, Article IV., of the Constitution of the State, and because the General Assembly of Illinois had no power under Section 5, Article IX., of the Constitution of the State to vest the Commissioners or jury selected or the County Court with authority to assess and collect taxes or special assessments for the contemplated improvement. (Updyke vs. Wright, 81 Ills., 49, and Webster vs. People, unreported.)

After the break in the levee of 1876 and a subsequent one in 1880, although the whole amount of complainants' bonds and those of others were unpaid, the Commissioners, at the reques of the land owners, continued in possession of said levee, and by the use of it protected their own lands and the lands of the other defendants from overflow, with a fund for keeping the levee in repair provided by certain land owners by conveying to said Commissioners, by deeds of trust, about thirty thousand acres of land.

These trust deeds described the grantees therein as "Commissioners appointed by the County Court of Pike County under and by virtue of the Act of April 24, 1871"; recited the construction of the levee under said act and the decision of the Supreme Court of Illinois against the validity of the assessments, and authorized the trustees within certain limitations to assess on the lands thereby conveyed, annual assessments up to fifty cents per acre for such amounts as were deemed by the Commissioners necessary to maintain and keep said levee in repair, but forbade the assessment of any sum to pay for the construction of the levee. Under these deeds much money was raised and expended upon the levee. (Trust deeds, Record, p. 460.) The answer admits $30,000. (Record, pp. 55-33.)

Not before the 26th day of January, 1887, did the Commissioners cancel and release these trust deeds, and then this was done in pursuance of another and more extensive scheme for continuing said levee, namely, the organization of the Sny Island Levee Drainage District, hereinafter more fully described.

In the meantime, on the 4th day of May, 1878, while these trust deeds were in force and the Sny Island Levee Commissioners were collecting moneys by means thereof, Francis Palms, the complainants' testator, filed a bill on behalf of himself and others against the Sny Levee Drainage Commissioners in the Circuit Court of the United States for the Southern District of Illinois in Equity. It is the original bill to which the bill in this suit is supplemental and in revivor.

The bill charged more fully and at length the facts hereinbefore stated, with the additional averments that all the owners and occupants of the lands assessed had full knowledge that the entire expense of said levee was paid for by said Commissioners out of the money received from said Palms and other purchasers of bonds. (Record, p. 410; statement of contents of same, Record, pp. 9-14.) In it Complainant Palms prayed among other things for a decree for an accounting of the moneys received from him by the Commissioners as aforesaid and used in the construction of the levee and the interest thereon; that he have for such amount a lien upon the levee and works and the lands acquired by the Commissioners for the site thereof and upon the assessments and interest thereon upon the other lands described in Exhibit "A;" that the Commissioners be ordered to proceed to collect said assessments and interest under the order and direction of the Court;

for the appointment of receivers to take charge of said levee and all books and papers of said Commissioners and to collect under the direction of said Court said assessments and interest; and for other and further relief. (Record, pp. 13 and 19.)

The defendant Commissioners, on the 13th day of March, 1879, filed their answer to said bill, admitting substantially all the material allegations therein and specifically admitting *that they had accepted the levee when it was completed by the contractors, and received it as a complete levee, sufficient in hight and strength to protect said lands from overflow.* (Original answer, Record, p. 429; statement of contents, Record, pp. 14-16). In said answer they claimed that because of the registration of said bonds with the Auditor of Public Accounts of the State of Illinois that the bond owners had thereby elected the mode prescribed by the supplemental act of 1872 for the collection of interest on said bonds and that they, said Commissioners, were by said election relieved from the duty of looking after the same, and were not responsible for the failure to collect the moneys to pay said interest, and were without any duty to perform in respect to said assessments; that certain land owners had at all times opposed the proceedings which subjected their lands to assessments for benefits on account of said levee, and had refused to pay interest accruing on said assessments, and because of this, other land owners otherwise inclined to pay their assessments, saw the futility of so doing, unless payment could be enforced against all alike, which resulted in a return by the township collector of all or nearly all of said lands as delinquent. Thereupon the County Collector made application for judgment on assessments against said delinquent lands to the Pike

County Court, and some of the land owners so opposing said assessments filed objections to the judgment, setting up that the law under which the assessments were imposed, was unconstitutional. That the Commissioners employed counsel and the County Court gave judgment against the lands. The resisting land owners appealed to the Circuit Court, and thence to the Supreme Court of the State, and the final judgment rendered by that Court was adverse to the right to collect said assessments, and they submitted that the decision of said case was decisive against any right upon their part to enforce any payment of any assessments in any manner.

They also averred that "as Commissioners they are not now, and never have been in any actual possession of any part of said levee, except for the purpose of constructing, maintaining and repairing the same; and they are advised and believe they never had title to any portion of said levee on account of the unconstitutionality of the law under which said work was done; and since said law was declared unconstitutional these respondents have only exercised authority over said levee in warning parties against injuring said levee, but this was in their private capacity, at the request of a portion of the land owners, who supplied them with funds for that purpose, in whose behalf they have, in like private capacity, tried to keep said levee in repair."

Thereupon, on March 13th, 1879, the said cause was set down for hearing upon bill and answer, and after argument and consideration by the Court, the United States Circuit Court for the Southern District of Illinois, in Equity, Circuit Judge Drummond presiding, entered a decree containing among other matters the following provisions:

Decree of Judge Drummond, March 13, 1879.

"That the defendants retain the right of way, levee and other works, and keep and preserve and protect the same under the order and control of this Court *for the benefit of the complainants and all other persons interested therein.*"

"That the complainants and all other persons who may have advanced money to the defendants for the right of way, for the construction of said levee and other works, or who may be the holders of any of the bonds issued by the defendants to raise money for the purposes aforesaid, who may come into this suit and contribute their proper proportion for the expenses thereof, have liberty to go before the Master and produce their bonds and coupons, and make proof of the amount due them of principal and interest."

Said decree referred the cause to John A. Jones, Master in Chancery, to take proofs, upon proper notice, of the amounts due the complainants, and other parties, and to make report to the Court with such proofs of the amounts found due by him to each and every party who appeared before him, with the grounds of his several findings, and also provided that after the coming in of said report, and the approval thereof by the Court:

"The said complainant, and other persons, have the liberty to exhibit and file their supplemental bill or bills against any or all of the present or former owners of the lands alleged in said bill to be benefited by said levee, to compel them to contribute to the payment of the amounts found due, as aforesaid, and for such other and further relief as they may be advised they are entitled to," * * * "and the said complainant is at liberty to use the names of the defendants in such supplemental bill if they are advised it is necessary for them to do so upon tendering sufficient indemnity." (Record, pp. 437, 438.)

Decree of Judge Drummond, July 7th, 1880.

July 7th, 1880, Judge Drummond rendered a further decree in said cause, overruling the exceptions of defendants to said Master's report, and confirming and approving the same and adjudging the amount of interest due to the complainants' testator up to that date.

Said decree further declared "that the several sums of money so found due are a lien upon the assessments made under the order of the County Court of Pike County, upon the lands described in the bound book (Exhibit "A") with complainants' bill, and upon the said lands as provided in the 27th and 35th Sections of an Act of the General Assembly of the State of Illinois entitled "An Act to provide for the construction and protection of drains, levees and other works," approved April 24th, 1871, "and it further appearing to the Court that the defendant Commissioners have no money in their hands for the payment of the amount so found and adjudged to be due the said several complainants, and it also appearing to the Court from the allegations of the complainants' bill, and not denied by the defendants in their answer thereto, that they have taken no steps for the collection of the assessments made upon said lands for the repayment of the moneys borrowed by them, and the bonds and coupons issued by them, it was ordered by the Court that the complainants have the right and liberty to proceed in this Court in the names of said defendants as complainants as such Commissioners or in their own names as complainants against the lands described in said Exhibit "A," and the owners thereof, or such lands and the owners thereof, and other persons and said Commissioners, as they may be advised are liable for or bound to pay the sums found to be due to the

complainants as aforesaid, jointly or severally, by a bill or bills, original or supplemental or otherwise, as they may be advised, for the recovery of the amounts found due them as aforesaid, and also for the costs of this suit." (Record, pp. 438 to 441.)

After the decision of the Supreme Court of Illinois in the Webster case, and after the filing of this original bill by Palms, and while the Commissioners were in possession of the levee, the People of the State of Illinois, at an election held November 5, 1878, adopted an amendment to Section 31 of Article IV. of the Constitution of the State, to read as follows:

"The General Assembly of Illinois may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State by a special assessment upon the property benefited thereby." (Star & Curtis' Annotated Statutes of Ill., p. 122.) This amendment was proposed in the Legislature of Illinois by A. C. Mathews, one of the defendants. (Record, p. 87.)

Under the authority of this amendment the General Assembly of the State of Illinois passed "An Act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes and to provide for the organization of drainage districts." Laws of 1879, p. 120, Star & Curtis' Annotated Statutes, p. 919.

Levee Law of 1879—Petition for Formation of District Thereunder.

The answer in this case admits that the submission of this amendment and its adoption by the people, and the passage of this statute was secured in part by the efforts of some of these defendants. (Record, pp. 55-4 to 55-57.) This act was also introduced in the Legislature by A. C. Mathews, one of the defendants in this case. (Record, p. 87.) "A copy of so much of this act as is material is attached hereto, marked Exhibit 'C.'"

It took effect May 29, 1879. It provided for the formation of drainage districts to construct drains, ditches and levees for agricultural, sanitary and mining purposes, and also drainage districts to maintain and keep in repair any such drains, ditches or levees "heretofore constructed under any law of this State." Section 2. And in cases where a levee had been theretofore built "under any law of this State," the annual assessments for keeping the same in repair were made due and payable on the first of September.

The Supreme Court of Illinois say, in Blake vs. People, 109 Ill., 504, that "the only law to which this could refer was the" (levee and drainage) "act of April 24, 1871." The Supreme Court of Illinois held this act constitutional in Huston vs. Clark, 112 Ills., 344, and in Osborn vs. People, 103 Ills., 224, that the validity of the district organization could not be attacked collaterally.

Thereafter, on the 26th day of January, 1880, a number of land owners, whose lands were described and included in the original assessments for the construction of the levee and in the original bill filed by Francis Palms, filed a petition, conforming in substance to the requirements of said last mentioned act. In said petition they describe the route, terminus and character of the original

levee, alleging that it "was constructed under the laws of the State of Illinois, then in force in the Counties of Adams, Pike and Calhoun, in the years 1872, 1873 and 1874." They alleged that while the purpose was desirable the levee had not accomplished it. They further allege that "by proper repair and maintenance of said levee, the lands aforesaid" (being part of the lands described in the original bill of Palms and in this bill filed by his executors, amounting in the aggregate to about 90,000 acres) otherwise of little value "would be reclaimed and brought into cultivation, and that, in addition, "it would greatly improve the sanitary condition of the locality through which said levee passes." They also alleged that it was absolutely necessary for the health and proper drainage and protection of said land, that said levee be "repaired as speedily" as possible; that the cost and expense thereof and the damages occasioned thereby, together with the annual expense of keeping the same in repair, would be less than the benefits to the lands affected by said repairs. They appointed the defendant A. C. Mathews to make any amendments to carry out the purpose of the petition.

They expressly confined their petition to repairing and maintaining the old levee and used no words which gave them any right to build a new levee. Their object in so doing was to acquire all the rights of way and easements of the old levee and to obtain a color of title to it in its entirety. (Rec., pp. 31-33.) In this petition the descriptions of lands to be benefited or damaged by the repair

and maintenance of said levee were substantially the same as those contained in Bound Book Exhibit "A" to the original bill of Mr. Palms. Bound Book Exhibit "X" and Book Exhibit "10."

They then prayed that a drainage district, to be known as the Sny Island Levee Drainage District, be formed out of the said lands subject to periodical overflow by the Mississippi river in the townships aforesaid, *for the repair and maintenance of said levee, according to the statute,* and that commissioners be appointed with the powers and authority named in the Act of May 29th, 1879, and that they be directed to do all acts provided in said law for repairing levees, ditches and drains from assessments to be ordered, and for other and further relief. (Answer of defendants, pp. 55-4 et seq. Bound book, Exhibit "10," Record, p. 499.)

Such proceedings were had therein that the County Court of Pike County, by all necessary and legal orders, duly created the Sny Island Levee Drainage District, which, in the year 1880, received the surrender of the levee from the original Sny Levee Drainage Commissioners, and took possession and control of the levee and other works, and still has control and possession thereof, with the knowledge and consent and approval of the defendant Commissioners in the Palms suit, and of all the defendants in this suit, who had also notice that the said levee had been built in part by the money received for that purpose from said Francis Palms. (Answer of defendants, Record, pp. 55-4, Bound Book Exhibit "X" and Book Exhibit "10.")

Naturally there were some breaks in the levee caused by the unusual height and volume of the river while the levee was new and had not settled, and the repair and protection thereof were neglected, and in 1880 the extraordinary height and volume of the Mississippi river caused

Death of Mr. Palms—Filing of Present Bill—Maturity of Installments of Assessments and of Bonds.

extensive breaks and did much damage to the settlements on the bottom lands between the levee and the bluffs of the river bank. Since then there had been but one break—in 1888—and the levee has settled and grown firm until it is now as solid and secure as the natural river bank.

On the 24th day of November, 1886, the complainant in the original suit died, and on the 4th day of January, 1889, the complainants in this suit, who had qualified as executors and trustees under his will, were authorized to continue the prosecution of said suit, and filed the present bill by leave of court.

The complainants are still the owners and holders of all the bonds described in the original bill of said Francis Palms, deceased, and in the report of the Master as aforesaid, and the defendants have not paid any moneys whatsoever on account of the said bonds or the interest thereon, except interest for the years 1873 and 1874, as above stated. (Testimony of Mr. O'Brien, Record, p. 372.) The bonds belonging to the complainants which have become due were again specifically produced and proved before the Master in this case.

The installments of the first assessment levied in 1872, which fell due prior to the filing of this bill in 1889, were for $50,000 in each of the years 1882, 1883, 1884, 1885, 1886, 1887, 1888, aggregating $350,000. (Record, p. 22.) None of the installments of the assessment of 1875 were due when the present bill was filed, as this assessment was made payable in 1892, 1893 and 1894. (Book Exhibit "10.") None of Mr. Palms' bonds fell due until July, 1883. In that year $28,000.00 matured, $6,000.00 in 1884, $9,000.00 in 1885, and $13,000.00 July 1, 1886.

Acts of Estoppel—Soliciting Passage of Act of 1871—Organization of Mississippi Levee Drainage Company —Appropriation of Levee.

It appears from the proofs that the defendant Commissioner Westlake died and no successor has been appointed to fill his place, but the other defendants, Wheelock and Jones, remained Commissioners as aforesaid.

The proofs also show that very many, if not all, of those of said defendants who have acquired title to any portion of said lands since the levying of the assessments of 1872 and 1875, respectively, took the same with full notice of the existence of such assessments, and the proceedings in the Pike County Court in relation thereto, and the issue of bonds by the Commissioners, and the sale thereof, as well as notice of the expenditure of the proceeds thereof in the construction of said levee, and that the levee was constructed solely with the money thus furnished, and that those moneys have not been repaid. They also show that the defendants, with like knowledge and notice, have appropriated and used said levee in the protection of their lands from overflow by the Mississippi river, for a long time past, and still so appropriate and use the same, but none of the defendants have, since the years 1873 and 1874, ever contributed any sum of money whatever for the reimbursement of complainants' testator for the moneys advanced for the construction of said levee.

They show that certain defendants participated in the issue and sale of said bonds to complainants' testator, and in causing said proceeds to be expended in the construction of said levee by actively soliciting and procuring the passage of the act to provide for the construction of levees, approved April 24th, 1871. That certain other defendants participated in causing the bonds to

be issued and sold and the proceeds expended in the construction of the levee by subscribing to the stock of the Mississippi Levee Drainage Company, organized for the purpose of giving effect to the act of April 24, 1871, and to raise money to do the necessary work prior to the steps taken in the County Court for Pike County. (Clark's testimony, Record, p. 59.) That certain other of the defendants are purchasers with notice from the last described land owners.

That all the defendants who acquired title to the lands now claimed by them since May 4th, 1878, are purchasers with notice because the original bill of the complainants' testator was filed on that day, and is still pending and of record in this Court; that in addition to the pendency of said bill the decrees thereupon of March 13, 1879, and July 7, 1880, putting the levee into the hands of the Commissioners as receivers were full notice of the complainants' equities, to any subsequent purchasers of the lands in question.

That certain of the defendants participated in causing the bonds to be issued and sold and the proceeds expended in the construction of the levee and in causing the assessments to be made on the lands benefited by said levee (specifically described in Bound Book Exhibit "A") by signing and presenting the original petition for the construction of said levee to the Pike County Court in August, 1871. (Record, pp. 55-40, original petition; Record, pp. 442 to 447.)

That certain other defendants are purchasers with notice from the last named defendants.

Acts of Estoppel—Trust Deeds—Amendment to Constitution of 1878—Purchasers with Notice.

That certain other defendants participated in procuring the issue and sale of said bonds and the expenditure of the proceeds thereof in the construction of the levee and in causing the lands to be assessed by order of the Pike County Court by filing on the 30th day of November, 1874, the petition for the second assessment in 1875. (Record, pp. 55-40.)

That certain other defendants are purchasers with notice from some of the last named defendants.

That certain other of the defendants, well knowing that the levee had been constructed with the moneys of the complainants and others, and that the amounts of complainants' bonds and interest thereon were wholly unpaid, and knowing and consenting to all of the proceedings of the Pike County Court, and having authorized the assessments of their lands for the payment of the principal and interest of said bonds, combining with the defendant commissioners, whose duty, as said defendants well knew, was to collect said assessments and pay the amount thereof to the complainants in discharge of the principal and interest of said bonds and for the purpose of defeating the just claim of defendants, procured the defendant Commissioners to take excusive possession and control of the said levee as their agents and claiming to act in their private capacity and use and appropriate the same to the protection of their lands with the powers and under the provisions of certain trust deeds, which said trust deeds stipulated that no part of the funds collected by means thereof should ever be applied upon the indebtedness created by or on account of the original construction of said levee. (Record, pp. 55-41.)

That certain other defendants were purchasers with notice from some of the last named defendants.

Acts of Estoppel—Petition for Formation of Sny Island Levee Drainage District—Parties and Proceedings Thereunder—Deeds Excepting Levee Assessments from Warranty—Heirs at Law Purchasers with Notice.

That certain other defendants actively participated in procuring the submission by the Legislature of Illinois and the adoption by the people of the constitutional amendment of 1878 and the passage of the act of May, 1879, under the provisions thereof.

That certain other defendants filed the petition in the Pike County Court for the creation of the Sny Island Levee Drainage District with the expressed purpose of repairing and maintaining the levee originally constructed under the Act of 1871 and were parties to the proceedings therein. (Record, pp. 55-41, 55-48.)

That certain other defendants are purchasers with notice from some of the last named defendants.

That certain other defendants were interested in the lands in which they are now interested and which are described in Bound Book Exhibit "X" on the 26th day of January, 1880, when the petition for the organization of the Sny Island Levee Drainage District was filed, and in pursuance of the statute were severally made parties to and had due notice of and are bound by all of the proceedings for the organization of said Drainage District.

That certain other defendants are purchasers with notice from some of the defendants last named.

That certain other defendants are heirs-at-law of ancestors or devisees and legatees of persons who took part in some or all of the proceedings before mentioned, by which said bonds were issued and assessments levied and the levee constructed.

Annual Assessments by Sny Island Levee Drainage District—Condition of Lands Before Levee.

That certain other defendants have acquired title to the lands in which they are now interested as set forth in said Bound Book Exhibit "X" through deeds of conveyance expressly recognizing and agreeing to pay the liens of the assessments upon said tracts of land for the amounts advanced by complainants' testator for the construction of said levee and other works.

That every one of the defendants have by the payment of assessments by themselves or their grantors, made upon their lands by the said Sny Island Levee Drainage District, having at the time of such payment full knowledge that the levee and other work were constructed with the funds furnished by complainants' testator and of the decrees of the United States Circuit Court for the Southern District of Illinois of March, 1879, and July, 1880, declaring a lien in favor of the complainants' testator, and also having full knowledge that no part of the amounts due to the complainants had been paid, approved and ratified the acts of said Sny Island Levee Drainage District in appropriating the said levee for the protection of the said lands of said defendants.

That said Sny Island Levee Drainage District has annually since its organization made large assessments upon nearly all said tracts of land which are rightfully subject to the lien of the assessments for the payment of complainants' bonds, for the purpose of raising money to pay the cost of the repair and maintenance of said levee, and that said defendants pretend that said assessments are a lien upon said lands paramount to complainants' lien, and said defendants intending to defeat the just lien of complainants by certain pretended proceedings in some court, have caused many of said tracts to be sold for

the assessments made through said Sny Island Levee Drainage District and have caused deeds to be made on said sales.

That before the construction of said levee the entire body of lands which includes the tracts assessed for the construction of the said levee and each of the tracts thereof, was so wet and swampy and subject to such frequent overflows by the Mississippi River that they did not exceed in value an average of fifty cents per acre. That while the average assessments per acre greatly exceeded the then market value of said lands, it was expected and promised by the land owners and the commissioners that the construction of said levees as proposed, would drain said lands and protect them from overflow, render them healthy and productive, and so greatly enhance them in value as to make them ample and desirable security for said assessments.

That complainants' testator, relying upon said representations, was induced to purchase and pay for said bonds, in the belief that after said levee was completed said lands would be drained and protected from overflow and made healthful and profitable for cultivation and enhanced in value to an average of twenty-five dollars per acre, and that thereby the assessments on said lands would become an adequate security for the amount of said bonds.

All the defendants who appeared demurred to the Bill of Complaint in this case on the following grounds:

(1) Want of equity in the bill.

(2) That the claims of the complainants have become stale, and by reason of the complainants' negligence in pressing and enforcing their rights, are not now enforceable against the defendants.

(3) That complainants and their testator have been guilty of laches and have so long remained idle that the rights of many outside persons have intervened so that complainants are estopped to assert their rights against the defendants.

(4) That the allegations in the bill do not raise any implied promise on the part of the defendants, nor any equitable obligation to pay the bonds or any sum of money.

(5) That the facts alleged in the bill do not entitle complainants to any lien or charge upon defendants' lands.

(6) That the complainants' remedy is at law.

Upon the argument of the demurrers, Messrs. Hay, Greene & Humphrey assigned as additional grounds of demurrer *ore tenus;* that this court had no jurisdiction to collect the assessments in the mode prayed for in the bill, nor in any other way, and depending thereon, that there is *no lien on the lands* in favor of the complainants.

These grounds of demurrer raised all the questions of law which were afterwards raised at the final hearing except (1) the question of the sufficiency of the original construction of the levee and its conformity to the requirements of the contract, and (2) the effect of sales of lands, on which drainage assessments had been levied for general taxes pending the litigation.

The demurrers came on for hearing before the Circuit Court of the United States for the Southern District of Illinois in equity, Judge Gresham presiding, and were all overruled.

Thereupon the demurring defendants and other defendants answered, full and extensive proofs were taken

and the cause submitted to United States District Judge William J. Allen on the 9th day of November, 1895. On the 10th day of February, 1897, he entered a decree dismissing the bill of complaint with costs. (Opinion, Record, pp. 474-489.)

An appeal was perfected on the 5th day of April, 1897, the record on appeal was filed in the United States Circuit Court of Appeals for the Seventh Circuit on the 30th day of June, 1897, and the cause came on and was heard on the 7th and 8th of June, 1898, before Mr. Justice Harlan, Circuit Judge Woods. Circuit Judge Showalter took part in the hearing, but died before the decision of the case, which was announced on the 6th day of June, 1899, by Mr. Justice Harlan.

The case comes into this Honorable Court on a writ of certiorari granted May 14th, 1900.

SPECIFICATION OF ERRORS.

The following errors are assigned *ex magna caute*, because they are perhaps technically necessary in view of the numerous classes of defendants embraced in the general language of the opinions and scope of the decisions below.

They can be argued and considered conveniently under the respective heads of the argument which follows and no specific examination of each error assigned will be required unless some question of their sufficiency is made by the defendants in error.

The errors relied upon, briefly stated, are as follows:

1st. That the United States Circuit Court of Appeals for the Seventh District held and decided that the lands intended to be benefited and protected by the levee constructed under the Act of 1871 could not be specially assessed by any action taken in conformity with the provisions of that act.

2nd. That said United States Circuit Court of Appeals held and decided that nothing was said or done by the owners of the lands so intended to be benefited and protected that estopped them to dispute the validity of the Act of 1871 and of all that was done under it, or that created any equity in favor of the holders of bonds to have said lands sold to pay and special assessment for the bonds issued to contractors.

3rd. That the United States Circuit Court for the Southern District of Illinois decided that the complainants, as purchasers of the bonds issued under the provisions of the Act of April 24, 1871, did not acquire an equitable right

to enforce the lien provided by said act, and that a court of equity has no jurisdiction to enforce the rights of complainants under the act.

4th. That said Circuit Court held that the defendants named in the bill and proofs, who caused and procured the passage by the General Assembly of the State of Illinois of the Act of April 24, 1871, and thereafter availed themselves of its provisions for the protection of their lands by the construction of the levee, might deny in a court of equity the constitutionality of the act and assert the consequent invalidity of the assessments made thereunder, and dismissed the bill of complaint as to them.

5th. That the said Circuit Court decided to the same effect with reference to the assessments upon lands owned by defendants who purchased with notice lands covered by said assessments from persons of the last described class.

6th. That the said Circuit Court decided to the same effect with reference to the lands belonging to the defendants named in the bill and proofs, who signed and presented the original petition for the construction of said levee to the County Court of Pike County, in the State of Illinois, in August, 1871, and dismissed the bill as to them.

7th. That the said Circuit Court decided to the same effect with reference to the assessments upon lands owned by defendants who purchased with notice lands covered by said assessments from persons of the last described class.

8th. That the said Circuit Court decided to the same effect in respect of assessments on lands owned by defendants named in the bill and proofs who filed the petition for the second assessment of 1875 in the Pike County Court of Illinois, and dismissed the bill as to them.

9th. That the said Circuit Court decided to the same effect in respect of the assessments on lands belonging to defendants who purchased with notice from persons in the last described class.

10th. That the said Circuit Court decided to the same effect in respect of defendants named in the bill and proofs who joined in the execution of certain trust deeds and procured the commissioners of the drainage district to take control of the said levee as their agents and use and appropriate the same to the protection of their lands.

11th. That the said Circuit Court decided to the same effect in respect to the assessments upon lands of defendants named in the bill and proofs who were purchasers with notice from persons of the last described class.

12th. That the Circuit Court decided to the same effect in respect of assessments on lands belonging to defendants named in the bill and proofs who procured the passage by the Legislature and the adoption by the people of Illinois of the constitution and amendment of 1878 and the passage of the Act of May, 1879, and dismissed the bill as to them.

13th. That the said Circuit Court decided to the same effect in respect of assessments upon lands of defendants named in the bill and proofs who were purchasers with notice from persons in the last above described class.

14th. That the said Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants named in the bill and proofs who filed the petition in the Pike County Court of Illinois under the Act of May, 1879, for the creation of the Sny Island Levee Drainage District and became parties to the proceedings therein.

Specification of Errors.

15th. That the said Circuit Court decided to the same effect in respect to assessments upon lands belonging to defendants named in the bill and proofs who were purchasers with notice from persons in said last described class.

16th. That the said Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants named in the bill and proofs who were made parties to and had due notice of and were bound by all of the proceedings for the organization of the said Sny Island Levee Drainage District.

17th. That the said circuit Court decided to the same effect in respect of defendants named in the bill and proofs who were purchasers with notice from persons in the last above described class.

18th. That the said Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants named in the bill and proofs who were heirs at law of ancestors or devisees of persons who took part in some or all of the proceedings above mentioned.

19th. That the Circuit Court decided to the same effect in respect of assessments upon lands belonging to defendants described in the bill and proofs who were purchasers with notice from persons in said last above described class.

20th. That the Circuit Court decided to the same effect in respect of assessments upon lands belonging to certain defendants named in the bill and proofs who have acquired their title through deeds of conveyance expressly recognizing the lien of the assessments upon said tracts of land for the amounts advanced by complainants' testator for the construction of said levee and other works.

Specification of Errors.

21st. That the said Circuit Court decided to the same effect with respect to assessments upon lands described in the bill belonging to certain defendants named in the bill and proofs who have by payment by themselves or their grantors of assessments made by the Sny Island Levee Drainage District, with full knowledge that the levee was constructed with the funds furnished by complainants' testator and of the Circuit Court of the United States for the Southern District of Illinois, rendered in March, 1879, and July, 1880, declared a lien in favor of the complainants' testator, and also having full knowledge that no part of the amount due to the complainants had been paid, approved and ratified the acts of said Sny Island Levee Drainage District.

22nd. That the said Circuit Court held and decided that the complainants' testator was guilty of laches in the prosecution of his claims under said bonds.

23rd. That the said Circuit Court held and decided that the purpose of the bill was to collect a tax.

24th. That the said Circuit Court held and decided that the transfers and conveyances of some of the lands upon which there were assessments for the construction of the levee had changed the conditions and relations of the party as to the subject matter of the suit, and that, therefore, the complainants could not have the relief prayed.

25th. That the said Circuit Court of the United States for the Southern District of Illinois decided that the act of April 24, 1871, was unconstitutional and void.

26th. That the United States Circuit Court of Appeals for Seventh Circuit decided that the act of April 24, 1871, was unconstitutional and void.

ARGUMENT.

To the case made by the complainants as above stated the defendants set up the same claims of defence which were raised by their demurrers set out on p. 30, *supra*, and decided against them. They may conveniently be grouped for the purpose of argument as follows:

a. That the levee act of April 21, 1874, is unconstitutional and void.

b. That the bill is to collect a tax and a court of equity has no jurisdiction.

c. That there is nothing in the case which estops them or any of them from asserting the invalidity of the levee act of April 24, 1871.

d. That the complainants and their testator were guilty of laches and thereby have lost their remedy.

e. That the levee was not properly located and was not constructed of sufficient dimensions and strength or in a proper manner to be a protective levee.

f. That the Sny Island Levee Drainage District and other defendants have purchased tax titles on many of the lands upon which assessments sought to be enforced by the bill were levied and have obtained deeds thereunder, which are paramount to the lien of the assessments.

As appears from the preceding statement, complainants seek to enforce severally against lands of certain defendants the liens of separate assessments for the construction of the levee, with the proceeds of which the levee was built,

upon the grounds 1st, that such assessments were levied in strict conformity with the terms of the statute of 1871, which was a valid law, and 2nd, that even if that statute was unconstitutional many of the defendants owning such lands are estopped to deny the constitutionality of said act and attack the assessments on that ground.

It is not a bill to compel contributions to, or collect proportionate amounts of, a gross sum, but is a bill in the nature of a foreclosure bill to enforce, on several and specific parcels of lands, the liens of several and specific assessments upon the faith of which the moneys which built the levee were advanced.

The case is not upon a bill to collect a tax and is not within the decisions of Berkley vs. Levee Commissioners, 93 U. S., 264, and Thompson vs. Allen, 115 U. S., 550.

It is entirely different from Litchfield vs. Ballou, 114 U. S., 190; Aetna Life Insurance Co. vs. Middleport, 124 U. S., 534, and cases of like character, in that the complainants in this case do not seek to hold any municipal corporation or any individual liable, directly or indirectly, at law or in equity, but simply ask the enforcement of certain special assessments against the lands of individual defendants, on the ground, 1st, that the levee law is constitutional and, 2nd, that it is not; that certain of the defendants have so conducted themselves in the premises, that they are estopped to allege any invalidity in the law providing for said assessments.

The federal courts can enforce liens created by State laws and have repeatedly done so.

Fitch vs. Creighton, 24 How., 159, a street opening assessment.

Idaho & Oregon Land Improvement Co., 132 U. S., 509, a mechanic's lien.

Argument.

The Levee Law of 1871 is Constitutional.

Jones vs. The Great Southern Fireproof Hotel Co., 86 Fed., 370.

Hagar vs. Reclamation District, 111 U. S., 701, a levee lien.

New Orleans vs. Warner, 175 U. S., 120.

After the issue of the bonds and the levy of assessments in this case the Supreme Court of Illinois, in Updike vs. Wright, 81 Ills., 49, decided that the Illinois Constitution of 1870 prohibited the Legislature from creating drainage districts. They put their decision upon the following section of the Constitution:

"The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform with respect to persons and property within the jurisdiction of the body imposing the same."

Art. IX., Sec. 9, Illinois Constitution.
Revd. Sts. Illinois 1874, p. 75.

The same Constitution also contained the following sections:

Article IV., Sec. 1: "The legislative power shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both to be elected by the people." Rev'd Sts. Illinois 1874, p. 60.

Art. IV., Sec. 4. "The General Assembly shall provide in all cases when it may be necessary to sell real estate for the non-payment of taxes or special assessments

for State, county, municipal or other purposes, that a return," etc. Rev'd Sts. Ills., 1874, p. 75.

"The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others." Art. IV., Sec. 31.

The last section was first introduced in the Constitution of 1870.

Obviously the broad grant of legislative power in Article IV., Sec. 1, would include the right to create levee drainage districts unless Article IX., Sec. 9, is a limitation of such power.

The legislative power of the General Assembly f Illinois "extends to everything within the sphere of that power, except as it is restricted by the Federal Constitution or that of the State."

> Township of Pine Grove vs. Talcott, 19 Wall., 636.

We respectfully submit that Article IX., Section 9, is not such a limitation.

The Supreme Court of Illinois, in People vs. Mayor, etc., 51 Ills., 30, said "To what extent Section 9, Article IX., Constitution of 1848, is to be construed as a limitation upon the power of local taxation by the Legislature itself, it is not necessary to decide. However strong the argument in favor of so construing it, there nevertheless may be cases where the Legislature, without the consent of the corporate authorities, might impose taxes, local in their character, if required by the general good government of the State, because such taxes would not be merely and only for corporate purposes."

Argument.

The Levee Law of 1871 is Constitutional.

The Constitution of Massachusetts conferred upon its Legislature under the title of the General Court

"Power to make ordinances and establish all manner of wholesome and reasonable ordinances, laws, statutes and ordinances as the general court shall judge to be for the good and welfare of this commonwealth and for the government and ordering thereof and of the subjects of the same."

This is the full equivalent of the language of the Illinois Constitution that "the legislative power shall be vested in a General Assembly."

The drainage laws of Massachusetts have been uniformly upheld.

A comprehensive drainage law was sustained in Sherman vs. Tobey, 3 Allen, 7.

The statute for the improvement of meadows was reviewed in the Supreme Court in Talbot vs. Hudson, 16 Gray, 417, and its constitutionality was sustained.

It came up and was again sustained in Coomes vs. Burt, 39 Mass., 422, which is referred to with approval and distinguished from the Boston Fire Case in Lowell vs. Boston, 111 Mass., 454. In the Boston Fire Case the Court say, p. 468: "In the statutes for the improvement of meadows the provisions for the assessment and collection of the expenses in form resemble taxation and the powers exercised over private property are sometimes ascribed to the right of eminent domain. But there is no taking for public use. It is a proceeding of a semi-judicial nature in which all those whose lands are affected are joined as parties. The action taken therein relates to that in which all have a common interest or in reference to which all are affected by a common necessity. That common necessity

is made and that common interest secured by subjecting the individual rights to such modifications as the commissioners may judge to be most practical to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are adjusted with due regard to the interests of all as well as of each. For this purpose they are treated as the owners of common property. Coombes vs. Burt, 22 Pick., 422. The Court also say, p. 469: "We find in these statutes no exercise of the right of eminent domain or of the governmental power of taxation that which in form resembles taxation, is, in effect, only an equitable apportionment among the parties to the proceedings, of the expenses incurred for their common benefit by their common agents, or rather by the officers of the tribunal charged by the Legislature with the conduct of these proceedings which it authorizes for the execution of its wholesome and reasonable orders and laws in that behalf made and provided."

To the same effect are the decisions in New York, Pennsylvania, New Jersey, Ohio and Indiana.

The validity of statutes of this character and the power of the Legislature to provide for the payment of the cost of the common benefit by special assessments are treated as settled law.

6 Am. & Eng. Encyl. of Law, p. 14, citing:

Idem, p. 12.
Hagar vs. Reclamation District, 111 U. S., 701.
Cooley on Taxation, pp. 101, 402, 403.
Cooley's Cons. Juris., 636-7.

Constitutionality of the Levee Law of 1871—State Court Decisions, Burgess vs. Seligman.

Tidewater Co. vs. Costn., 3 C. E. Greene, N. J., 518.
Reeves vs. Treasr., 8 Ohio St., 333.
Ross vs. Davis, 97 Indiana, 79.
Sessions vs. Crinkelton, 20 Ohio St., 349.
Meranda vs. Spinlin, 100 Ind., 380.

The construction adopted in Updike vs. Wright not only does violence to and renders nugatory the other provisions of the State Constitution above quoted, but it makes it impossible for the State of Illinois or any county, or school district therein to bridge a creek, improve a road, erect a school house or make any other local improvement.

They cannot do it by special assessment because they are neither cities, towns nor villages. They cannot do it by general taxation because it is only for other corporate purposes than making local improvements that municipal corporations can be vested with authority to assess and collect taxes. Surely such a construction, so disastrous to the prosperity of the State and the health and welfare of its inhabitants, should not be adopted unless the constitutional limitation upon the power of the General Assembly is so direct and positive as to admit of no other construction.

Moreover, this decision ignores Art. IX., Sec. 4, above quoted, and takes from the Legislature the express power granted in Article IV., Sec. 31, of the same constitution "to pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others."

Argument.

Constitutionality of the Levee Law of 1871—Differences in Constitutions of 1848 and 1870.

The Supreme Court of Illinois in construing the similar grant of power in the Constitutional amendment of 1878, say: "An express grant of power to do a certain thing without any words of limitation or restriction carries with it all necessary and proper means to make the power effectual, and the body to whom such power is given is in such case the sole judge of the means to be employed to give it practical effect, especially where that body, except so far as limited and restricted, has plenary power."

Huston vs. Clark, 112 Ills., 244, 349.

Updike vs. Wright was not decided *until after* the assessments had been levied, the bonds issued and sold, and the levee constructed in this case, and falls within the rule declared by this Court in Burgess vs. Seligman, 107 U. S., 20. To escape this rule defendants assert that previous decisions of the Supreme Court of Illinois interpreted a provision similar to Article IX., Section 9, in a former constitution (1848) in the same way.

This contention overlooks the material and important fact that the constitution of 1848 contained no such clause as Article IX., Section 31, empowering the Legislature to pass laws permitting owners or occupants of lands to construct drains and ditches across the lands of others. It is a fair presumption that the people of Illinois intended by inserting this section in the Constitution of 1870 to prevent these former decisions from restricting and hindering the proper drainage of their state, well knowing that, traversed as it was by the Mississippi, Ohio, Illinois and other great rivers, it was especially in need of extensive systems of drainage; that they had the experience and

decisions of Massachusetts in view and intended to give the Legislature equally broad powers in respect of large and important systems of drainage which were demanded by the common good and should not be prevented by individual selfishness.

The two sections are quite different in their grant of power. That in the Constitution of 1848 confines the delegation of power to "taxes for corporate purposes which shall be uniform in respect of persons and property." It does not speak of special assessments. While the section in the Constitution of 1870 includes special assessments.

The constitution of 1848 read "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for c o r p o r a t e purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same," and the Constitution of 1870 reads the General Assembly "may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments or special taxation of contiguous property or otherwise."

This levee was not a "corporate purpose" of "any county, township, school district, city, town or village." Neither was it a local improvement of any "city, town or village."

It was a much needed sanitary and drainage improvement of a large territory comprehending many townships, but wholly disassociated from the corporate purposes or needs of any of them.

It is a strained and far too strict a construction to hold that this clause is a limitation on the legislative power to

provide for systems of drainage across the lands of others by special assessments on the lands benefited.

It should be borne in mind that Updike vs. Wright was a case of a levee alone not connected with any system of drainage whatever, while the Sny Levee was essentially a part of an extensive system of draining the lands it protected, by utilizing the Sny for that purpose, in connection with a canal constructed in connection with and at the lower end of the levee.

EVEN IF THE LEVEE LAW IS UNCONSTITUTIONAL, ASSESSMENTS ARE VALID ON LANDS OF ESTOPPED DEFENDANTS.

But in case the Court should be of opinion that the construction of the Illinois Constitution by the Supreme Court of that State is the correct one or that this Court is bound thereby, the complainants still are entitled to recover special assessments on the lands of those who have estopped themselves to assert the unconstitutionality of the levee law.

The benefit of this estoppel is claimed for:

1st. The assessments against lands belonging to defendants who are estopped by conduct previous to the purchase by complainant's testator of the bonds issued by the levee commissioners in payment of the expense and cost of the location and construction of the levee.

2nd. The assessments upon lands belonging to defendants, who by acts of appropriation of the levee and ratification of the conduct of others appropriating it, with full knowledge of the benefits to be had from it, and that it was built with the money of the bondholders have and

still are receiving the benefit of its protection to their lands, thereby precluding themselves from now setting up the unconstitutionality of the law under which the assessments were levied.

It is not contended that defendants are concluded by the assessments. It is admitted that they may assert any defect in the proceedings under the statute or any want of conformity to the requirements of the statute, but the claim is that they cannot attack the validity of the statute which they have held out to the bondholders as an inducement to invest their money in the bonds.

In considering this question of estoppel it is important to bear in mind the character of the levee.

It is obvious that the enterprise of constructing such an immense work must have been a common undertaking of many individuals, and that everyone in the neighborhood or certainly along the line of the levee would have knowledge of its inception, progress and completion. So that while only specific acts of certain individuals are shown, they must be considered in the light of the common scheme and plan of all to build a levee, and not merely as separate and independent acts.

The proofs show:

That certain defendant land owners formed and subscribed to the stock of the Mississippi Levee Drainage Company "for the purpose of carrying into effect" the levee law of 1871 (Record, p. 59), "and which furnished the means necessary to do the preliminary work." That numerous public meetings were held in the leading towns of Pike County in and near the levee district, which were quite freely advertised by handbills, at which the law was read and its provisions explained and contributions were

obtained from defendant land owners for the preliminary work under the act of 1871. Articles to like effect were published in Hannibal Courier. (Record, pp. 60-62.) Other defendant land owners petitioned the County Court of Pike County to commence proceedings under the act, one hundred and thirteen in first petition (Record, p. 447), and one hundred and twenty-three in the second petition (Record, pp. 26, 27, 442); that all resident land owners had personal, and all non-resident land owners constructive, service of notice of said petition; that none took any steps to restrain said proceedings, but all stood by and encouraged the work until it was completed; that Wheelock and the other commissioners "acting for such land owners" authorized the publication of Pamphlet A (Record, p. 385), which contained opinions of eminent counsel that the law was constitutional and the proceedings under it valid, and the certificate of the commissioners (Record, p. 390): "*There is no opposition to the improvement, but on the contrary, it is unanimously demanded by the owners of the land.*" and also contained a like certificate of the Judge of the Pike County Court; (Record, p. 391) that interest assessments were paid by the land owners, and the interest on the first issue of bonds was paid to Palms for 1873 and 1874 by the commissioners (Record, pp. 385, 410), thereby inducing Palms to take the whole issue of 1875 in the sum of $148,500. (Record, p. 372.) The defendant Wheelock was a land owner and one of the Levee Commissioners. The record shows the following acts of estoppel as to him: "He knew Clark was undertaking to get the law through the legislature (Record, p. 167), signed the petition for the appointment of commissioners and the institution of proceedings under the act (Record, p. 446), accepted the office of commissioner (Record, p. 66), was active in the pro-

ceedings to acquire title to the site of levee by voluntary deeds, made a written report to the Court; executed the contract for the construction of the levee (Record, p. 67); paid the interest on the bonds for the years 1873 and 1874 (Record, pp. 385-410); authorized the publication of the pamphlet containing the certificate of the commissioners (Record, pp. 389-390), "that there was no opposition to the improvement, but on the contrary, it was unanimously demanded by the owners of the land," and containing opinions of eminent counsel that the proceedings were valid and the assessments legal (Record, pp. 387-9); delivered the bonds to the contractors in payment of their work; accepted the trust under the trust deed and collected assessments thereunder to repair and maintain the levee (Record, p. 68); held possession of the levee as receiver under appointment of the Federal Court in the original bill filed by Mr. Palms in the Federal Court; without authority from that Court turned it over to the present Sny Island Levee Drainage District, which still holds possession of it and with it *protects his lands from overflow.*

Defendant Clark's conduct and acts of estoppel are, if possible, more binding. He was the head and front of the whole scheme from its very inception; procured the drawing up and passage of the law; called and addressed meetings of land owners to get action taken under the law; got up the Mississippi Levee Drainage Company; as he says, "officiated as the organizer generally and did all the talking" (Record, p. 60); went over the proposed route of the levee with commissioners and commissioners' engineer; obtained, with assistance of Mr. Chamberlain, another defendant land owner, the signatures to the petition to the Pike County Court; went with the cimmissioners' engineer and jury when they viewed the route and made their as-

sessments; "made all the publications the law required:" posted the notices; was up and down the levee so often that his "horse got so that he knew the places almost;" in fact, did everything in his power to get the levee constructed by money and work advanced on the faith of the act. (Record, pp. 58, 65, 77, 93, 106, 114, 246.)

The record also shows that many other defendants who are specifically named participated in some or all of the above named ways in invoking action under the statute of 1871 and inducing contractors and others to invest their money in the enterprise upon the faith of the assessments to be made under the law.

The Court of Appeals for the Seventh Circuit held that none of the defendants were estopped from setting up the unconstitutionality of the law as a defense to the bill.

With great deference to the learning and ability of that Court, we submit that this holding was erroneous.

An equitable estoppel arises when one person has induced another to act upon the supposition that a state of facts exists which does not exist in fact or has pursued a course of conduct in respect to his own property or rights which has led another into expenditures which are to be lost if the party so misleading is afterwards allowed to assert rights inconsistent with such course of conduct.

Morrell vs. Mackman, 24 Mich., 279.

In Dickerson vs. Colgrove, 100 U. S., 578, it is held that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

Argument.

Principles of Estoppel Applied in Cases of Invalid Statutes—Illinois Decision on the Statute in Question.

In a case in Michigan a wife learned that her husband had sold as his own a horse belonging to her, without her authority. She had ample time to inform the purchaser of her rights before he paid the purchase money but did not do so. She was held estopped to assert title to the horse even in an action at law.

Dann vs. Cudney, 13 Mich., 239.

Here the woman only kept silent. Wheelock, Clark and other defendants did everything in their power, by representations and conduct, to induce the purchase of the bonds for their benefit.

In Michigan it is settled law that "if by words or conduct one has intimated that he consents to an act which has been done and that he will not oppose it (although it could not have been lawfully done without his consent), and thereby induces others to do that from which they might have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of others who have given faith to his words or to the fair inference to be drawn from his conduct.

Truesdail vs. Ward, 24 Mich., 117.
Heyer vs. O'Hagen, 60 Mich., 150.

This general principle of estoppel has been frequently applied in cases of invalid acts of the Legislature, in cases similar to the one at bar.

In respect of this identical law and levee, the Supreme Court of Illinois, in Blake vs. The People, 109 Ill., 504, 521, fully recognize this principle, and declare the effect of the decision in the Webster case in accordance with it.

Argument.

Cases Enforcing Estoppel Against Pleading Unconstitutionality of a Statute.

Blake objected to the payment of an assessment levied by The Sny Island Levee Drainage Commissioners under the act of 1879, upon the ground that the Sny levee was not built under any law of the State of Illinois, because the Act of 1871 had been declared by the Supreme Court of Illinois to be unconstitutional. His contention was not sustained by the court, and the assessment was held valid.

We quote from the opinion of the Court:

"It is not accurate to say, merely because a law is repugnant to some provision of the constitution as in favor of particular rights, it is no law for any purpose. The respects wherein the act of April 24, 1871, was condemned as being unconstitutional were only as affecting those over whose lands the drains, levees, etc., were proposed to be constructed without the owners' consent, and those against whose property it was proposed to assess the costs of constructing such drains or levees without their consent. As to all other persons, and for all other purposes, the act was a valid law. As to those who were seeking to construct the drain, levee, etc., and who were promoters of the corporation, and to those who otherwise relinquished all right to interpose these objections to the validity of the law—as, for instance, those who gave the right of way for the drains and levees, and who voluntarily paid their special assessments—the law was not void. Cooley's Const. Lim. (1st ed.), 181; Baker vs. Braman, 6 Hill, 47; Embury vs. Connor, 3 N. Y. (3 Comst., 511). And precisely the same must be true as to whether the construction of the levee was in excess of the authority conferred by the statute. As to those who did not, in some proper way, give

their consent thereto, and whose property was proposed to be taken or damaged thereby, or to be charged with the expense thereof, the act of building the levee was not 'under any law of this State;' but as to those who built the levee upon their own land, or who voluntarily consented that others might build it there, and to those who voluntarily built it, and who voluntarily paid their assessments for that purpose, it was 'under the law of this State.' Except as against owners of land resisting the appropriation of their property to public use, or the damaging of it for that purpose, or resisting the enforcement of special assessments for the payment of the expenses of the construction of such levee, the 'Sny levee' was at all times entitled to the protection of law—and even as to those, their remedy was not to disregard all legal rights therein to others, but to enforce their own legal rights through the aid of courts" (p. 521).

In Daniels vs. Tierney, 102 U. S., 415, plaintiffs in error had given a bond to stay execution in a judgment against them under the provisions of an ordinance of the confederate State of Virginia. After the expiration of the time named in the ordinance (i. e., "when its operation ceased") plaintiffs in error were sued on the bond. They pleaded the invalidity of the bond because it was executed in pursuance of a statute of one of the confederate States, and was illegal and void.

The United States Supreme Court held:

1. That the ordinance was unconstitutional and void (p. 418); that the bond must be considered as an entirety, and

2. Declined to decide upon the validity of the bond as a common law bond, but treated it for the purposes of the decision as wholly void (p. 420).

3. That the obligors were liable upon the ground "that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit." "In such cases," the Court say, "the principle of estoppel applies with full force and effect." Citing cases, analyses of which I subjoin, and quoting with approval this language in Ferguson vs. Landrum, 5 Bush: "Upon what principle of exalted equality shall a man be permitted to receive a valuable consideration through a statute procured by his own consent or subsequently sanctioned by him or from which he derived an interest and consideration and then keep the consideration and repudiate the statute?" (p. 421, foot).

In Ferguson et al. vs. Landrum et al., 1 Bush, 548, complainants filed a bill to enjoin the levy of a tax to reimburse the county for a loan used to obtain volunteers for the federal army, and thereby save the citizens of the county from the operation of the draft. The Court held: the several acts which the Legislature had passed in the early part of 1865, authorizing the county courts for the Counties of Gallatin and Boone, respectively, to issue county bonds for the purpose of raising and paying money used and to be used, and expended in procuring volunteers and substitutes to fill the quota, or to exempt drafted men in said counties from service in the army of the United

States; and also authorizing said county courts, respectively, to levy and collect taxes to pay off said bonds *unconstitutional and invalid* as to those who did not participate in procuring the passage of said acts, and have never ratified them and have never received any benefit therefrom, but *the Court further say:* "We are equally clear that all those who were instrumental in the procurement of their passage or have acquiesced in and approved them, or have been the recipients of benefits under them, should not escape responsibility, and in equity and good conscience should be compelled to bear their proportion of the burden imposed by them."

"Before they escape from responsibility they must honestly return every cent which has been laid out and expended for their use and benefit."

And in a subsequent opinion in the same case reported in Ferguson vs. Landrum, 5 Bush, 230, the former decision of the court was adhered to, and the persons therein held responsible were held liable to the tax and as being estopped from denying the constitutionality of said enactment, and the court declared that, "In procuring the money and obtaining with it the volunteers, such parties violated no law of morality, or of the government; their contract was not void for want of consideration or illegality, *but it is the means* by which the sum for its reimbursement is to be raised that they assail. Parties are estopped from denying the constitutionality of a local statute by participating in the procurement of its passage, by ratifying, acquiescing in or approving it after its passage, and becoming recipients of benefits under it; and all such persons are held to be liable to the tax authorized by such

enactment, although it is unconstitutional and invalid as to all other persons," citing 4 Kent, Comstock's Ed., note 4, p. 261, 3 Hill, 219.

In Moran vs. Commissioners, 2 Black, 722, a county was held estopped to deny the validity of bonds issued by it which recited facts that would show them to have been regularly issued.

In City of Burlington vs. Gilbert, 31 Iowa, 356:

"where a city charter provided that the council should have power to cause to be opened, paved and improved any street or alley on the petition of not less than two-thirds of the abutting owners; it is *held* that a person who joined in such petition was thereby estopped from afterwards claiming that the assessment of a tax for the improvement petitioned for was unauthorized and illegal on the ground that two-thirds of the abutting owners did not join in the petition, 'While those who did not join in the petition might not be bound, those who did are.' "

Citing People vs. Goodwin, 1 Selden, 573.
Kellogg, Treas., etc., vs. Ely, 15 Ohio St., 66.

In People vs. Murray et al., 5 Hill, 468, a statute, after authorizing certain persons to erect a dam across a river provided that they should execute a bond to the people conditioned to pay such damages as each and every person might sustain from the erection of the dam; that any person conceiving himself aggrieved might apply to a county judge for the appointment of a justice of the peace *to inquire and ascertain whether* such person had sustained

damages by means of the dam; that the assessment of the justice should be signed by him and filed with the county clerk; that if the damages assessed were not paid within a specified time, the person entitled thereto might prosecute the bond; and that a certified copy of the assessment should be conclusive evidence of the amount of the damages. It was objected that if the certificate was held conclusive evidence of damage it took away the right of trial by jury, and the law would, therefore, be unconstitutional. *Held* in an action upon the bond, that the assessment was conclusive not only as to amount of damages, but also of the fact that they were caused by the erection of the dam.

"*Held* further, that the defendants, having acted under the statute by building the dam, were not at liberty to question the constitutionality of the provision relating to the mode of assessing damage." Nelson, C. J., says they "took the grant to build the dam with this condition (i. e. evidence of damage) attached to it; and they are not now at liberty to make the objection, though under other circumstances it might have been effectual."

In Van Hook et al. vs. Whitlock et al., 26 Wendell, 43, "where an act of incorporation of an insurance company contained a clause subjecting the stockholders of the company, at the time of its dissolution, individually to the payment of the debts of the company contracted before its dissolution, and the company had, in compliance with an act of the Legislature, assigned its property for the benefit of the creditors of the company (such act declaring that upon making such assignment the stockholders should be in no way liable for the demand of the creditors of the company), and the creditors received dividends under such assignments. It was held that though the act under which

the assignment was made was unconstitutional and void as to creditors whose demands existed previous to the passage of the act, still that the creditors having come in and accepted dividends under the assignment, were estopped and deprived of the right of calling upon the stockholders individually for the payment of the residue of their debts not received under the assignment," citing a number of cases.

In Motz et al. vs. City of Detr it 18 Mich., 495, Cooley, C. J., certain property owners before any contract had been entered into by the city for grading and paving a street joined in a petition to the Common Council to cause the street to be paved, the Council ordered the pavement as requested, the Court held the provision in the charter of the City of Detroit under which the paving assessments were to be assessed and collected by foot frontage void on the same grounds as Norwood vs. Baker, 172 U. S., but also held that these land owners who had petitioned for the improvement were estopped to attack its validity, saying: "Under these circumstances they must be taken to have been willing and actively consenting parties to all the proceedings which led to the assessment and to have impliedly, at least, consented that such an assesment should be made," p. 528.

In Jackson vs. City of Detroit, 10 Mich., 248, "before certain paving (the assessment for which was in question) was done, an ordinance was submitted to the property owners, and accepted by them, whereby they were allowed to ornament and inclose a wide strip on each side of the street, and have the roadway paved or graveled within

eighteen months, according to the adopted plans and specifications for 1860, the year the contract was let. *Held,* in accepting this proposition the lot owners assented that the paving and sidewalk expenses might be assessed and collected under the ordinance and charter in the usual manner."

In Kellogg, Treas., etc., vs. Ely, 15 Ohio St., 64, where County Commissioners, acting on a petition of adjacent land owners, under a State statute, received bids, contracted for and had constructed a ditch; assessed amount necessary to pay for same against adjacent land owners, and caused the amounts to be placed on tax duplicates for collection, the defendant, who was so assessed, filed in the common pleas for his county a bill setting forth illegality of proceedings leading up to the assessments for the ditch, and praying for perpetual injunction to restrain the plaintiff in error, treasurer of the county, from collecting the assessments. The Court held that by his silence and inactivity during the construction of the ditch he was estopped from setting up such questions of illegality after his lands had been drained and he had received benefit from the ditch.

In Wiggin vs. Mayor et al. of N. Y., 9 Paige, 16, where an application for an injunction to restrain the collection of an assessment for widening, etc., a street in New York was based upon various illegalities and irregularities, on account of which complainant claimed that the Common Council had no jurisdiction to widen, etc., said street, after considering these questions, the Court say that the complainant, in waiting five years after improvements were commenced, and receiving the benefits of the im-

provements, will not be allowed to shift the payment on others, i. e., by a general tax, but is estopped.

In Chapman et al. vs. Mad River, etc., Ry., 6 Ohio St., 119, it was held that, conceding the Attorney-General has no power to authorize a corporation to embark in new enterprises beyond and outside the scope of its charter; yet it is clear that before a stockholder can be entitled to a remedy by injunction against such departure from the original objects of the incorporation, he must have shown himself prompt and vigilant in the assertion of his rights as a stockholder. It will not do for him to wait till the mischief he complains of is accomplished, fortunes expended and great public interests created. If he do, he must be held to have acquiesced in the change.

In the matter of application of Edward Cooper, 93 N. Y., 507, Cooper joined in the proceedings to acquire lands for a public market in the City of New York by signing a petition asking for the appointment of a person named as one of the commissioners of estimate and assessment, who was appointed. The commissioners duly executed their office, appraising Cooper's lands among others. Cooper then moved to set aside the order appointing the commissioners beause of the unconstitutionality of the act and of non-compliance with certain statutory conditions.

Held, that he was estopped to raise these questions.

In Bidwell vs. City of Pittsburg, 85 Penn. St., 412, Bidwell was active in procuring an ordinance from the councils of Pittsburg directing the grading and paving of a certain street, was elected commissioner under the ordi-

nance charged with the superintendence of the improvement, sold city bonds and expended funds to defray the cost and made assessments in the mode prescribed by the ordinance upon the abutting property. The act of assembly, in accordance with which the ordinance was passed, was unconstitutional. Held, that Bidwell was estopped from denying the validity of the act of assembly.

The following cases are also to the same effect:

*Dewhurst vs. City of Allegheny, 95 Penn. St., 437, an action at law.

Ricketts vs. Sprasker, 77 Ind., 371.

*Tabor vs. Ferguson, 109 Ind., 227.

*State vs. Mitchell, 31 Ohio St., 592.

*City of Columbus vs. Sohl, 44 Ohio St., 479.

*City of Columbus vs. Sly, 44 Ohio St., 444.

*Muncey vs. Joest, 74 Ind., 409, a drainage case.

*Nervius vs. Otter Creek, etc., Co., 36 Ind., 189, action at law to recover a drainage assessment.

*Flora vs. Cline, 89 Ind., 208.

These decisions are not confined in their reasoning to the rule that equity will not relieve a complainant whose conduct has estopped him to ask relief in a court of equity. It would be utterly inconsistent with the broad spirit of equity jurisdiction if the rule of estoppel should depend for its exercise upon which side of the case the party estopped might happen to be.

In Daniels vs. Tierney, 102 U. S., 415; People vs, Murray, 5 Hill, 468, *ubi supra*, and the cases last above cited

which are marked with an asterisk, the estoppel was enforced against defendants in actions to recover assessments from them.

The opinion of the Circuit Court of Appeals states that "these authorities when carefully examined do not, we think, apply to a case in which the circumstances are so peculiar as those disclosed by this record. All who had any connection with the passage of the Act of 1871, or who desired its passage, acted as we may assume in good faith and in the firm belief that its provisions were not inconsistent with the Constitution of the State. It cannot be said that any one was guilty of fraud. No assurances of an affirmative character were given by the land owners to those who constructed the work, or to those who, like Palms, purchased the bonds after they were executed and delivered to the contractors."

"The land owners, the contractors, and the purchasers of bonds all had equal opportunities of information, and one class was no more to be charged with knowledge of the law than another class. It is a case of an honest mistake as to the competency of the legislature to do what it attempted to do, no one being misled by the assurances and representations of others."†

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†This statement is not accurate. Defendants Wheelock and the two other commissioners certified to Skelsey, Fuller and Pierce, the contractors, and to Pierce and Brower, financial agents, for use in selling the bonds in the printed pamphlet. (Record, pp. 385-393.) "There is no opposition to the improvement; but, on the contrary, it is unanimously demanded by the owners of the lands. (Record, pp. 389-390.)"

Argument.

Defendants are Estopped to Attack the Levee Law.

In respect to this portion of the opinion of the Court of Appeals, we beg leave to submit:

If the rule of estoppel applies there never was any legal obstacle to the imposition of special assessments to repair and maintain the levee. Again as a matter of fact, to execute act of May 29, 1879, passed by the Legislature, to execute the constitutional amendment of 1878, there was no legal obstacle to the imposition of special assessments to repair and maintain this levee. Very many of the defendant land owners, who had promoted the construction of the levee, availed themselves of the statute of 1879 and their right to do so was sustained in Blake vs. People, ubi supra.

When this act of 1879 was passed the levee was in the possession of defendant Wheelock and his fellow commissioners, not only as Sny Levee Drainage Commissioners, but also as receivers under the appointment by the U. S. Court in Palms' original suit. The land owners formed the new Sny Island Levee Drainage District *for the expressly stated and sole object of repairing* the original levee, and Wheelock and his colleagues surrendered possession of it to the new legally formed district, which has ever since kept and maintained and repaired it by means of assessments levied under the law of 1879.

The opinion of the Circuit Court of Appeals on this point is opposed to the decisions above cited. In each of the cases cited it could have been urged that the case was one of mutual mistake.

And it is in direct conflict with Bidwell vs. City of Pittsburgh, 85 Pa. St., 412, 418, where the Court say, pp. 417, 418: "The power (to take steps to improve a street) was called into action by the petitioners. They asked to have

the avenue brought under the operation of the act. They voluntarily asked for the privilege of becoming subject to all its provisions. They asked for the passage of the ordinance directing the work—for the assessment of their lands according to the frontage rule, in order to pay the bonds to be given to raise money to make the improvement. The authorities acceded to the request." * * *

They assumed the large additional indebtedness, relying upon the words and conduct of the petitioners. The latter declared they would submit themselves to all the charges and responsibilities imposed by that act. They wilfully caused the authorities to believe this as a matter of fact. So believing, the authorities acted upon it. They accepted the offer in the terms in which it was made. The petitioners directed the work. They received and enjoyed the benefits. To now permit them to deny the truth or the efficacy of the assurance given, and continued during the progress of the work, would work a fraud on the city which cannot be sanctioned."

"It is true every one is presumed to know the law, and knowledge thereof is said to be equally open to all. Conceding that the city had knowledge of the law, or ought to have had it, the like legal presumption applies to the plaintiff in error, and his equities derive no strength from that presumption. The city had no reason to believe that he would allege any invalidity in the law which he was praying to have extended over him. The city was misled, not by expressive silence merely of the plaintiff in error, but by his decided and persistent action. It has been held that where a party has acted upon a particular

construction of a contract which has been acquiesced in by the other, the latter is estopped from contesting it as the proper construction. Mercer Mining and Manufacturing Co. vs. McKee, 17 P. F. Smith, 170."

"The constitutional right against unjust taxation, which the plaintiff in error invokes, is given him for the protection of his private property. He may waive that protection and consent to such action in regard to it as would otherwise be invalid. Having consented, and the other party having acted thereon, and made expenditures and incurred expense predicated thereon, the consent cannot be withdrawn."

In answer to a similar claim—of mutual mistake—the Supreme Court of Ohio say in State vs. Van Horne, 7 Ohio State, 327, 332: "The one" (the taxpayer) "was certainly as much bound to know (the law) as the other" (the bondholders) "and if both were mistaken no principle of law or justice would demand that the taxpayers should retain the fruits of the mistake, and at the same time repudiate those very acts of their own which misled the bondholders and induced them to part with their money; in truth blowing hot to get the bondholders' money and blowing cold to rid themselves of the obligation to refund it."

Granting the statement in the opinion of the Circuit Court of Appeals that "contrary to the expectations of all interested in them those proceedings were adjudged to be without the sanction of law." It does not take out of the rule the case of those defendant land owners who promoted and carried out the scheme for their own benefit and still retain its advantages. They obtained the money from Mr. Palms *to complete the levee by the second as-*

sessment under the same section of the act which authorized maintenance assessments, viz., Sec. 39, ubi sup., p. . .

"Any one or more new assessments may be made in the manner hereinbefore provided • • • either to supply any deficiency in any other assessment or t o r e p a i r, alter, or enlarge, cleanse, protect or maintain any drain, ditch, levee or other work constructed by virtue of this chapter."

Therefore it seems indisputable that if the principle of estoppel applies to any, it must apply to all the provisions of the statute. If the rule prevents the promoting defendant land-owners from alleging the unconstitutionality of the statute as to assessments *for constructing the levee,* it must prevent such an allegation against the assessments for *maintaining* the levee.

But such a distinction is not founded in justice and right between the parties.

The defendant land owners who were promoting the scheme did not ask the expenditure of money from contractors and others on the faith *of construction assessments which were not to be binding unless* the repair and maintenance assessments were held valid. They held out the entire statute as the inducement. They asked the money and work of others upon the faith *of all the provisions of the statute,* and by their conduct assured contractors and others, in the language of the opinion in Bidwell vs. City of Pittsburgh, *ubi sup., that they would not allege "any invalidity in the law which they were praying to have extended over them."*

The position that the bond owners could only rely on construction assessments in case the maintenance assessments were valid overlooks the self-evident fact that no

business man of ordinary prudence would have ever advanced money on the bonds unless he believed the levee was intended to be maintained. What would be left of the security—i. e., the assessments on the lands—if there were no means of continuing the protection of the levee over the lands and they returned to their former state?

Moreover, the land owners and the bondholders do not stand on the same ground. The bondholders originally were indifferent to the building of the levee; they owned no lands which it would protect. The land owners interested them in the matter as solely a money investment, they offered the inducement of a liberal discount and rate of interest for their money upon a loan secured, by liens through the assessments, on lands which the levee would reclaim and make valuable. The bondholders were investors; the land owners were promoters. As promoters they asked the bondholders for a loan of money in order to construct a levee to protect their lands. The latter could not be presumed to expect the former would ever attempt to repudiate the law which they held out to them as valid, or that a court of equity would allow them to do so.

CLASSES OF DEFENDANTS WHO ARE ESTOPPED AND PURCHASERS WITH NOTICE.

If these principles of estoppel are applied in this cause, the first general class of assessments, i. e., those upon lands belonging to defendants who are estopped by conduct previous to the purchase by complainants' testator of the bonds issued by the levee commissioners in payment of the expense and cost of the location and construction of the levee, may be devided as follows:

Assessments against the lands—

(1) Of defendants, who procured the passage of the act of the Legislature under which the county court of Pike

county and the commissioners appointed thereby, acted and built the levee and asked for and received the complainants' money.

The allegation that some of the defendants procured the passage of the Act of 1871 is said not to be appropriate. This criticism is based upon a misapprehension of the intended, if not actual, significance of the verb. The context clearly shows that there was no intention of questioning the motives of the Legislature in passing the act in question. Such an allegation would be not only inappropriate but manifestly improper.

> Fletcher vs. Peck, 6 Cranch., 87, 130.
> Warner vs. New Orleans, 175 U. S., 120.

But it is obvious that the Legislature of Illinois cannot of their own knowledge be aware of all the local needs in every part of the state. Some one must bring these to their attention and request appropriate legislation.

The case at bar furnishes an apt illustration: Defendant A. C. Mathews introduced in the Illinois Legislature the resolution for the amendment to the Constitution in respect of levees; and also the Act of May, 1879. It does not seem either improper or inappropriate to say he procured their passage; not because the Legislature did not act upon their own judgment as to what was proper to be done, but because he called their attention to the facts of the siutation and the needed remedy. It is a very common practice to petition and memorialize a Legislature in matters of local concerns as well as general policy. It is admitted in the briefs of opposing counsel that the act of 1871, the constitutional amendment of 1878 and the act of 1879 were enacted "through the instrumentality of the land owners.

(2) Of defendants who subscribed to the stock of the Mississippi Levee Drainage Company, organized for the *purpose of giving effect to the act of April 24, 1871, and* to raise sufficient money to do the necessary work prior to the steps taken by the county court for Pike County.

(3) Of defendants who petitioned the Pike County court to exercise jurisdiction and order the construction of the levee and the making of an assessment to pay for the same.

(4) Of defendants who voluntarily paid interest for the years 1873 and 1874 upon the assessments levied against their lands, and thereby gave credit to the original assessments and bonds issued thereunder, so that the complainants' testator was induced to purchase not only the bonds first issued but all of the bonds issued upon the faith of the second assessment.

(5) Of defendants who petitioned for the second assessment.

(6) Of defendants who had notice of the petitions for the first and second assessments, and did not object to the same, and all persons against whose lands the assessment were confirmed by the county court of Pike County.

(7) Of defendants whose lands were benefited by the building of the levee, and who offered no objection, but stood by and saw the levee built for their benefit with knowledge that it was being paid for out of moneys raised from the sale of bonds issued on the faith of levee assessments.

And the second general class, i. e., assessments on lands belonging to defendants, who by acts of appropriation of the levee and ratification of acts of others appropriating it, with full knowledge of the benefits to be had from it,

have and still are receiving the benefit of its protection to their lands, and that it was built with the money of the bondholders, may be divided as follows:

Assessments against the lands—

(1) Of defendants who joined in the trust deeds to the commissioners after the decree of March, 1879.

(2) Of defendants who formed the Sny Island Levee Drainage District, through it appropriated the levee to their own use and benefit, and without objection paid the assessments, or any of them, made by said district for its maintenance and repair.

These classes include assessments on lands of persons who were owners of the lands at the time, the various acts charged as acts of estoppel, were done either by themselves or by persons having their express or implied prior authority or subsequent ratification.

There are also assessment on lands to which many defendants have acquired title since the proceedings and acts and conduct which are charged as an estoppel upon the the then land owners:

1. The lands of those defendants who have acquired title since the filing of the petition for the first assessment in August, 1871, with knowledge of the proceedings thereunder.

2. The lands of those who acquired title subsequent to the filing of the petition for the second assessment in 1874, with knowledge of the proceedings thereunder.

3. The lands of those who have purchased any lands included in the trust deeds of January and March, 1877.

Argument.

Purchasers with Notice.

4. The lands of those who have acquired title from parties who joined in the trust deeds to the commissioners, with knowledge or notice of those deeds, and that the lands which they purchased of such parties were benefited by the levee.

5. The lands of those who acquired title from persons who formed the Sny Island Levee Drainage District and filed a petition praying for creation of the same.

6. The lands of those who acquired title from persons who were notified of the formation of such district and did not object thereto, but acquiesced therein and received the benefits thereof.

7. The lands of those defendants who have acquired their title from persons who, without objection, paid assessments therein made by said district, or against which lands such assessments were confirmed by the Pike County court.

8. The lands of those defendants who have taken title by deeds which were made subject to, or referred to the first and second assessments, or either of them, or in whose chain of title there are any such deeds.

9. The lands of those defendants who are heirs or devisees of any of the persons named in the previous classes.

10. The lands of those defendants who acquired their title subsequent to the decree of this court in March, 1879, and thereby are charged with notice of all the proceedings set up in the original bill, which is the foundation of this bill.

11. The lands of those defendants who have taken title to any of the lands upon which assessments were levied

subsequent to the decree of this court, of July, 1880, and thereby charged with notice of all the proceedings had in said cause and of the lien of the complainants upon the assessments and upon said lands.

SUBSEQUENT PURCHASERS WITH NOTICE.

If the assessments on the lands of the above described defendants are valid, it follows logically that the assessments on lands benefitted by the levee and now held by defendants who purchased with notice from persons who found with the foregoing defendants in the several acts of estoppel above stated must be sustained.

Such assessments embrace those upon the lands of

(1) Defendants who have taken title by deed which were made subject to or refer to such assessments or in whose chain of title there are such deeds.

(2) Purchasers with notice of lands upon which there were levee assessments, after the filing of the petition for the first assessments in August, 1871.

(3) Purchasers with notice of lands upon which there were levee assessments, after the filing of the second petition.

(4) Purchasers of lands, which were included in the trust deeds to the commissioners upon which there are levee assessments.

(5) Purchasers of lands upon which there are levee assessments, from grantors in the trust deeds to the commissioners with knowledge or notice of that fact and that the lands which they purchased were benefited by the levee.

Argument.

Subsequent Purchasers with Notice.

(6) Purchasers with notice of lands on which there are levee assessments, from the persons who formed the Sny Island Levee Drainage District and filed a petition, praying for the creation of the same.

(7) Purchasers with notice of lands on which there are levee assessments, from persons duly notified of the proceedings for the formation of such district.

(8) Purchasers with notice of lands on which there are levee assessments from persons who without objection paid assessments made by said district.

(9) The heirs or devisees of any of the persons named

All of these persons will, of course, be bound by a notice of these assessments if the court shall hold the levee law constitutional. For it is expressly provided by the act that such registry shall be notice. Sec. 28, Drainage Law. (Record, p. 400.)

We will discuss under this head of the brief only the question of notice either by the record of the deeds or assessments or actual knowledge, leaving the question of *lis pendens* to be discussed separately. As affected by notice will be the defendants in classes first to eighth, inclusive.

If the Court holds the act to be unconstitutional, but that certain of the land owners, by reason of their conduct or acts *in pais*, are estopped to question its constitutionality, then we submit that purchasers from all said persons are put upon inquiry by the record of such assessments which appears in their chain of title, and it is their duty to make reasonable effort to ascertain the facts. If by such effort they might have learned facts which would make the assessments a valid lien upon the lands as against their grantor by reason of an estoppel, then they are chargeable with notice of those facts.

DEFENDANTS WHO HAVE ACQUIRED TITLE THROUGH DEEDS MADE SUBJECT TO OR REFERRING TO SUCH ASSESSMENTS.

The first class are persons who have acquired title by deeds which were made subject to or referred to such assessments.

There can be no doubt but that all such defendants are purchasers with notice, and stand in like predicament with their grantors. If the assessments entered into the consideration to be paid for the lands, and especially if in the deeds they assumed the payment of the assessments, they could not now dispute the validity of the same. Their case is like that of a person buying a piece of real estate subject to the payment of the mortgage thereon. While unless he expressly assumes and promises to pay the mortgage, he may not be personally liable, yet he will not be allowed to assert that the mortgage is for any reason invalid, or to deny that it is a lien upon the land.

Dickinson vs. Worthington, 10 Fed. Rep., 860.
Cordova vs. Hood, 17 Wallace, 1.

Lovejoy vs. Raymond, 58 Vermont, 509.

Even if the deeds only refer to these assessments and are not made subject to them, or have no words indicating that the price received by the grantor was affected by the existence of the assessments, still the reference to the assessments in the deeds is notice to the purchaser of the existence of the assessment, and he buys at his peril. If it is made to appear that any of his grantors were in such situation as respects these assessments that they were binding upon them and valid as to their lands, then they

are equally binding upon the purchaser and equally valid against his title to the lands.

Lovejoy vs. Raymond, supra.

In Case vs. Erwin, 18 Mich., 434, it was stated in the mortgage that the property was owned by the mortgagors and "Catlin and Erwin."

Held, that the mortgage bore on its face enough to indicate that Catlin & Erwin had claims in or to the property, and also to indicate that whatever was conveyed by it, and whether subordinate or not to these rights was to be ascertained by inquiry; that Goodrich, the mortgagee, was, therefore, chargeable with equities of Catlin & Erwin and bound by them, and that Jennings, who held only under the mortgage, was in like position.

In Norris vs. Hill, 1 Mich., 202, N. & M. divided land owned in common by them, and executed releases to each other. Green, J., says, "The releases must be taken and construed as one instrument in the light of all the surrounding circumstances to which they obviously point; for by such circumstances not only the parties to the deeds, but all parties claiming under them, are bound, it being a general rule of law and equity that 'when a purchaser cannot make out a title, but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact.'"

To the same effect, Fitzhugh vs. Barnard, 12 Mich., 104.

In American Emigrant Co. vs. Call et al., 22 Fed. Repr., 765, Call and the American Emigrant Co. owned certain interests in swamp lands, and C. entered into a certain agreement with the company which was, in effect, a conveyance of his interest, which agreement was recorded

and indexed. Court hold that the indexing as made was sufficient to put an examiner on inquiry. C. afterwards conveyed to S.

By the Court: "Having knowledge, either actual or constructive, of the facts recited in the agreement between his (S.'s) grantor and the complainant, he was, therefore, put upon inquiry in order to ascertain the real facts. He was not compelled to purchase the lands, but when about to do so he was charged with the duty of making proper examination touching the rights and equities of others when the record showed that others had such rights in the lands he was about to purchase. (3 Washburn, Real Prop., p. 328.)

In Campbell vs. Indianapolis and V. R. Co., 11 N. E. Rep., 482, the railway company took possession of a certain strip of land for its right of way under a parol license from the owner, Campbell; claimants under that owner brought action to recover possession of the strip. Howk, J., delivered the opinion of the court, holding that where a parol license of a right of way has been given, upon the faith of which moneys have been expended, the licensor *and those claiming under him with notice* will be estopped from revoking the license if the licensee cannot be placed in *statu quo.*

And further, "In the case in hand, the occupancy and use of the strip of land in controversy for appellees' roadbed and railroad track, and for the running of its trains, was sufficient notice to appellant, who claims under the original licensor, of appellees' equity; for that which shall be sufficient to put the party upon inquiry is notice." (Hiern vs. Mill, 13 Ves., 120; Singer vs. Scheible, 10 N. E. Rep., 616.)

Argument.

Subsequent Purchasers with Notice.

It was held by the Lord Chancellor in Mertins vs. Joliffe, 1 Amb., 314, where a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected with notice of that fact, "for it is *crassa negligentia* that he sought not after it." To the same effect

Ferrars vs. Cherry, 2 Vern., 384.
Moor vs. Bennett, 2 Chas. Cas.

In Dickenson vs. Worthington, 10 Fed. Rep., 860, where the trustee was authorized by the court to make a sale of certain land and simultaneously invest the purchase money in a mortgage in the same land, and he sold the land under order of the Court, but received no consideration and no mortgage was ever given, the trustee had no authority without a further order of the Court to afterwards receive the purchase money in cash, or make a deed for the land; and the proceedings of the court ordering the sale and the investment of the purchase money were sufficient to put anyone dealing with the property upon inquiry as to why the mortgage had not been given. The lien for the purchase money was not lost by the execution of the deed by the trustee.

In Cordova vs. Hood, 17 Wallace, p. 1, where a deed of land shows on its face that the consideration is yet to be paid, a second purchaser (that is to say, a purchaser from the vendee), who has notice of the deed, takes the land in those States where the English chancery doctrine of a vendor's lien prevails, subject to the vendor's lien, unless such lien has been in some way waived.

In the case of such a deed, it is the duty of the new purchaser to inquire; and where inquiry is a duty the party bound to make inquiry is bound with all the knowledge which he would have got had he inquired.

Argument.

Subsequent Purchasers with Notice.

In Humphreys vs. Gardner, 11 Johns., 61, Ross let a house to Humphreys and Gardner claimed the right to receive rent for same. It was agreed by R. & G. to submit question to arbitrators, H. meantime took possession of premises. Both R. & G. had notice of the decision, but it does not appear that actual notice was given to H. The action was to compel H. to pay rent. It was held that H. was bound to take notice of the award at his peril, he being privy to the submission and assenting to it and entering into the possession of the premises at the time, with knowledge of the submission of the parties claiming the rent.

And these considerations apply with equal force whether the present defendant holds his title directly from the party upon whose lands, by reason of his conduct or other facts, the assessments are binding, or whether such deed is more remote in his chain of title. A purchaser is chargeable with notice of everything that appears in his chain of title.

Mertins vs. Joliffe, 1 Amber, 314.
Hiern vs. Mill, 13 Ves., 120.
Bush vs. Ware, 15 Peters, 93.
Hazlett vs. Sinclair, 76 Ind., 488.
Hazlett vs. Sinclair, 84 Ind., 594.
Hazlett vs. Sinclair, 20 Ind., 40.

This notice puts them upon inquiry. Such inquiry is not sufficient if it stops with the mere ascertaining that the Supreme Court of Illinois has declared that the drainage law is unconstitutional. If they stop here they rest upon their own responsibility. It is their duty to go further and ascertain if any facts existed which, notwith-

standing the decision of the Supreme Court of the State of Illinois, made the assessments a valid lien upon the lands they purchased. If any such facts are shown to exist, then they hold their lands subject to such assessments.

Norris vs. Hill, 1 Mich., 202.
Fitzhugh vs. Barnard, 12 Mich., 104.
Campbell vs. Indianapolis & V. R. Co., 11 N. E. Rep., 482.
Singer vs. Scheible, 10 N. E. Rep., 616.
Hazlett vs. Sinclair, 76 Ind., 488.

In Bush vs. Ware, 5 Peters, 93, there was in question the title to lands, and the *defect* was in the government patent, which was issued to one party, while the right to it was in another. It was claimed that the defendant was a bona fide purchaser for value, having no knowledge of irregularity of issuing of patent.

The Court say, p. 111: "The question is not whether the defendant in fact saw any of the muniments of title, but whether or not he was not bound to see them. It will not do for a purchaser to close his eyes to facts which are open to his investigation by the exercise of that diligence which the law imposes. Such purchasers are not protected." * * * "The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such a defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser, and having notice of a fact which casts doubt upon the validity of his title, are the rights of innocent persons to be prejudiced through his negligence?"

Argument.

Subsequent Purchasers with Notice.

No principle is better established than that a purchaser must look to every part of his title.

In Lovejoy vs. Raymond, 58 Vermont, 509, it was held that the devise of the residue of an estate upon condition that certain legacies be paid by the residuary legatees will, upon their acceptance of the devise, charge the real estate so devised with an equitable lien for the payment of such legacies.

Subsequent purchasers, without actual notice, of real estate charged with the payment of such legacies, where their own deeds referred to others in the chain of title which mention such charge, were held to take with constructive notice, because of such reference, although the will was not recorded in the town where the land is situated.

Speaking of such purchasers the Court said: "The circumstances under which the last named defendants purchased the property were such as to put them upon inquiry as to the state of the title, and the law will impute to them such knowledge as they would or might have acquired by making such inquiry." The "circumstances" here referred to were references in deeds to town and probate records for descriptions of the property describing the interest as acquired from the estate.

This will also include all defendants who purchased lands described in the trust deeds of March, 1879. These deeds were on record. The trustees therein named were expressly described as Commissioners appointed under the act of April 24, 1871. It will also include all purchasers from parties joining in the trust deeds of lands, upon which there were levee assessments, although not included in the trust deeds, if at the time they purchased of their

grantors they had knowledge or notice either actual or constructive of this fact and that the lands purchased by them of such parties were benefited by the levee.

LIS PENDENS AND CONSTRUCTIVE NOTICE.

Whether the original bill by Mr. Palms against the Commissioners, to which this bill is supplemental and in review, operated as a technical lis pendens or not may be questionable. The fact that the landowners who were promoting the levee were in possession of the levee through their trustees—the Commissioners; and their names and lands and the assessments thereon were listed in detail in the bound book, Exhibit "A," attached to the bill of complaint, and that the relief prayed in the bill was the enforcement and collection of the special assessments would seem to warrant the claim.

Whiteside vs. Hazelton, 110 U. S., 206.
Stevens vs. The Railroads, 4 Fed., 97.

However this may be, we submit with confidence that the filing of that bill and the attendant circumstances are strong evidence of notice to all purchasers of any of said lands. The commissioners were in possession of and repairing and maintaining the levee as the agents of these landowners, who were promoting the construction of the levee. The character of the levee—a great public work, fifty-two miles in length, averaging eight feet in height, standing between the Mississippi River and one hundred and ten thousand acres of the finest land in the State and protecting it from overflow, constructed under the public act of the State legislature—could not fail to attract the

attention of every one in its locality to its existence and its protection of and benefit to the lands behind it. Certainly no one could purchase any of the lands protected by it without noticing it and understanding its purpose; neither could anyone purchase, with proper inquiry, any of the lands protected by it without learning the measures taken for its construction and without notice of the interest of each landowner in the levee, and his corresponding right and duty to pay his assessment for the cost thereof, and to see to its repair and maintenance through the levee commissioners, who were in possession of it in the interest and as agents of the land owners.

The ninth class, namely, the heirs or devisees of persons who while living were chargeable with notice, of course take only the rights of these under or through whom they claim as heirs or devisees.

ANSWER TO CLAIM OF DEFENCE BECAUSE OF LOCATION AND CONSTRUCTION OF LEVEE.

The Circuit Court of Appeals, in its opinion, say:

"There was evidence tending to show—indeed, we think the weight of evidence was—that the levee built under the Act of 1871 was not adequately constructed."

We do not understand the decision is placed on this ground, but it is proper to call it to the attention of this Honorable Court. No such finding was made by the Circuit Court for the Southern District of Illinois.

If by this is meant that there were breaks in the levee and that the levee at times did not withstand the resistless power of the Mississippi River, we respectfully submit it is no defence to complainants' claims.

Argument.

Answer to Claim of Defence Because of Location and Construction of Levee.

Surely, the contractors never guaranteed an indestructible levee. They were not insurers. *A fortiori*, the bondholders, even if they claimed under the contractors, did not. But they do not claim through or under the contractors. They claim under section 35. This is clearly shown hereafter (p. 87).

If this statement in the opinion means that the levee was not constructed and completed according to contract, the evidence is overwhelming that it was accepted as such by the commissioners and their chief engineer, and the commissioners took possession of it in 1875.

Corthell, Chief Engineer (Rec., p. 365).

Parkhurst Assistant Engineer (Rec., p. 351).

Defendant Jones, Commissioner (Rec., p. 71).

The present solid and stable condition of the levee, with a record of but one break in twenty-one years, is a conclusive answer to the claim of defendants that the levee was wholly inadequate.

But it is no fault of the bondholders that the protection to the lands which the levee has given so many years and still affords has at times been interrupted by breaks in the levee. Some, if not all, of them were due to want of proper care of the levee.

The bondholders had no voice in choosing its location or determining its dimensions or prescribing the manner in which it should be built, or any right to repair or protect it when completed. All questions of location and construction the land owners, through agents of their choice, had decided before the bondholders were asked to lend their money. The latter bought the bonds in good

faith, believing that the land owners had wisely planned and were properly constructing a protective levee. The commissioners' agreement with the contractors made the land owners' chief engineer the final and supreme arbiter of those questions. They assumed, as they were warranted in doing, that the land owners, through their commissioners, had wisely located and would properly construct, care for, repair and maintain the levee. Under these circumstances, upon what conceivable ground can the bondholders be held responsible for any breaks in the levee?

The contract between Wheelock, Jones and Dustin, Commissioners, provided, among other things, "that said parties of the first part, in consideration "of the promises of said levee commissioners hereinafter set forth, agree to construct and finish the proposed levee of the commissioners in accordance with the specifications now on file in the County Court of Pike County, Illinois, and with the instructions, from time to time, of the chief engineer of said levee commissioners and to his entire satisfaction and approval." Said levee is to be located according to the above general description by the chief engineer of said levee commission. (Record, pp. 366, 369.)

After and in consideration of the work to be done by the parties of the first part, the said levee commissioners agreed to pay them as follows: "The work to be paid for in the bonds issued by said levee commissioners at a valuation of ninety per cent of their par value, payments to be made on or before the tenth day of each month, * * * and to be made on estimates furnished by the chief engineer of said levee commissioners, reserving, however, ten per cent of each monthly estimate from each monthly

payment until the final and satisfactory completion of the work in this contract, when a final estimate will be made by the chief engineer, which shall be conclusive on the parties to this contract; and upon the making of such final estimate, the balance appearing due to the said party of the first part shall be paid." * * * "It is further agreed, in case of any disagreement or difference of opinion between the parties hereto as to the true intent and meaning of the contract, the matter shall be referred to the chief engineer of said levee commissioners, and his opinion shall be binding on all the parties to this contract." (Record, pp. 366-367.)

An inspection of this entire contract is invited. It will show how carefully it was drawn to protect the commissioners and the persons whom they represented against any default or deficiency in the performance of the contractors' agreement. As I understand it is settled law, I cite only a few out of many authorities that under a contract like this there cannot be any appeal from, or review of, the decision of the chief engineer, except on clear proof of fraud, of which there is not a scintilla in this case.

Savercool vs. Farwell, 17 Mich., 308.

Railroad Co. vs. March, 114 U. S., 549.

Shipman vs. District of Columbia, 119 U. S., 148.

Chicago, S. F. & C. R. Co. vs. Price, 138 U. S., 185.

Sheffield & B. Coal, I. & R. Co. vs. Gordon, 151 U. S., 285.

Reply to Claim of Defence Because of Location and Construction of Levee—Complainants do not Claim in Subrogation of Contractors.

Also a few out of many authorities that in a contract like the one at bar the ninety per cent to be paid on the monthly estimates becomes absolutely and unqualifiedly due the contractor at the time named in the contract, regardless of the fact or time of final completion of the contract.

Strauss vs. The Railroad Co., 7 W. Va., 368.
Baltimore & Ohio R. R. vs. Gallahaus, Admr., 14 Grattan, 563.
Hennessy vs. Farrell, 4 Cush., 267.

The ingenuity of the able counsel for defendants lead the Court of Appeals to consider the complainants' claim as one of subrogation to the rights of the contractors.

The bondholders do not claim under the contractors, but under their bonds, which by the provisions of Section 35 of the statute carry a lien on the assessments. There is not a word in the act or in the contract which gives the contractors any such lien, except through the bonds which they recover as their pay for work done and accepted by the chief engineer. The act is particularly careful not to do so.

Sec. 35. "The commissioners may borrow money, not exceeding in amount of assessments unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment, on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally

liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof."

Therefore, when the bonds signed and issued by the commissioners, were purchased by the public all questions as to the character or sufficiency of the construction of the levee had been conclusively and finally decided, and cannot now be set up as a defense to the assessments.

Reply to Claim of Defence of Laches.

Neither the opinion of the Circuit Court nor of the Court of Appeals puts the decision of the case upon the ground of laches of complainants or their testator, but the opinion of the Court of Appeals contains this language:

"He (Mr. Palms) was given leave to file such a bill by an order entered in 1879. But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000.00 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed. If the case depended alone upon the question of laches, there would be strong ground for holding that the plaintiffs and their testator so long delayed the institution of proceedings against the land owners that a court of equity ought to decline giving them any relief." * * *

We beg leave, with the utmost deference to the learned Circuit Court of Appeals, to call attention to some inaccuracies in this statement.

The statement that Mr. Palms "was given leave to file such a bill" (viz: a supplemental bill to bring the land

owners before the court) "by an order entered in 1879," is not correct. The decree of 1879 (Record, pp. 437, 438) did so state, but referred it to a master to ascertain the amounts due to the complainants and other persons, as holders of bonds issued by the defendants * * * to pay for the construction of said levee, and ordered that after "the coming in of the master's report of the amount or amounts found by him to be due the complainants or other persons who may come into the cause as aforesaid, and the approval of the said report, * * * the said complainants have the liberty to exhibit and file their supplemental bill or bills against any or all the present or former owners of the said land alleged in said bill to be benefited by the said levee."

The master's report was not filed until July 7th, 1880, and the definite and authoritative leave to Mr. Palms and others to file a supplemental bill for the recovery of the amounts found due them by the master was not granted until July 7th, 1880 (Record, pp. 439 to 441), and this order of leave was limited to the amounts found due by the master, which at that time included only the accrued interest.

The opinion also states: "But he died in 1886 without availing himself of the privilege so given, although a large amount of interest was unpaid, and although nearly $100,000 of the bonds of the first issue had fallen due. The present bill was not filed until 1889, about nine years after it could have been filed."

Whereas the record shows: That at the date of this decree nothing but interest had accrued; that no assessments fell due until October, 1883; that none of the Palms bonds matured until July, 1883, when only

$28,000 fell due; and that at his death, November 24th, 1886, only $58,000 had matured, $13,000 of this amount falling due within only a few months before his death. (Record, pp. 21, 22, 273.)

In 1880 there were extensive breaks in the levee, followed by more in 1881, which the land owners through the new levee drainage district organization were spending money in repairing, and it would have been unreasonable for Mr. Palms during these years to have harassed them with litigation, especially as none of the principal of his bonds was due.

His executors were appointed in 1887 and filed this bill in April, 1889. When the great amount of detailed examination of the titles to the lands in Exhibit "A" and the time necessary to have prepared the needed abstracts is considered, they proceeded with unusual speed. Their bill was filed a little more than two years after their appointment; before their entire claim had matured; less than six years after the earliest maturing bonds of the issue of 1872 fell due, *and three years before any of the bonds of the issue of 1875 had matured.* The earliest maturing bonds of this series did not become due until 1892. The Illinois statute of limitations, cited in the opinion, had not run against any one of Mr. Palms' bonds when the bill was filed.

Again, during the period between the decree of 1880 and the filing of the bill, no such changes in the title of the lands have occurred that defendants will suffer any injury if assessments are now enforced.

If any persons have purchased without notice of complainants' rights to enforce the assessments, then their lands go free. If they purchased with notice they did so at

their peril. All acts of estoppel necessarily must be proven by matters of record, or facts of general notoriety.

THE OBJECT OF THE BILL IS NOT TO COLLECT A TAX AND THE COMPLAINANT'S REMEDY IS IN EQUITY.

It is claimed that the object of the bill is to collect a tax; that such a purpose is not the subject of equity jurisdiction, and that the remedy of such complainants is at law and not in equity. It is too plain to need argument that the object of the bill is to enforce specific assessments on specific lands for specific benefits. It seems scarcely necessary in respect to this objection to do more than cite a few of the numerous decisions which recognize and declare that assessments are not taxes and point out the distinction between them. In the City of ttawa vs. the Trustees of the Free Church, 20 Illinois, 423, it is decided that church property, although not liable for ordinary taxes, may be assessed for special purposes. In Bride vs. City of Chicago, 22 Illinois, 573, and City of Peoria vs. Kidder, 25 Ills., 351, the Supreme Court says: "In reference to an assessment imposed for the purpose of widening streets a levy of that character is held not to be a tax, although in many respects similar." In Canal Trustees of Illinois and Michigan Canal, 12 Ills., 405, the real estate of the corporation was "exempted from taxation of every description by and under the laws of this State." Held, that the exemption did not cover a street opening assessment. The Court say: "A tax is imposed for some general or public object, it is an action made for the purpose of carrying on the government directly or through the medium of municipal corporations, which are but parts of the machinery em-

ployed in conducting the operations of the government. It is a charge on an estate that lessens its value."

The decisions in the State of New York are to the same effect, in the matter of the Mayor of New York, 11 Johnson, 77; Bleaker vs. Ballon, 3 Wend., 263; and in Pennsylvania, The Northern Liberties vs. St. John's Church, 13 Penn. St., 104; and in Ohio, 8 Ohio St. Rep., 333, is a very strong decision upon this question and as to the extended power of the legislature as to assessments.

The following decisions of the Supreme Court of the United States which are relied upon for this claim of defense are easily distinguishable:

In Wakely vs. City of Muscatine, 6 Wall., 481, an attempt was made by proceedings in chancery to compel the city to collect a tax wherewith to meet certain bonds, the validity of the bonds was not questioned, but the Court held the remedy was at law by a writ of mandamus.

Supervisors vs. Rogers, 7 Wall., 175.

The proceeding was by mandamus under a special law authorizing the courts to issue such writs to appoint a person to do the act ordered to be done, and under this provision the taxes were collected by the appointee of the Federal Court.

The case is explained in

Reese vs. City of Watertown, 9 Wall., 107.

Thompson vs. Allen, 115 U. S., 550, collects and reviews all the authorities.

But there is no analogy between these decisions and the case at bar. Here there is no question of levying and assessing a tax and then collecting it. In such a case the

creditor or party to be benefited by the collection of a tax has no lien which he can enforce, as is said by the Supreme Court of the United States in Berkley vs. Levee Commissioners, 93 U. S., 264, "Liens for taxes are very generally created throughout the country, but it is never supposed that the public creditors to whom the money raised by tax is to be paid have the benefit of such lien. It is created for the benefit of the public authorities to enable them with greater certainty and facility to collect the tax without the embarrassment of other claims against the property taxed." The radical difference between such a case and the present one where specific liens are given upon specific lands under a statute which declares that the "notes or bonds" * * * (given to raise means to construct the levee) "shall constitute a lien upon the assessments for the repayment of the principal and interest thereof, and that such assessment * * * shall be a lien upon the lands assessed until paid" is too obvious to need elaboration.

If the Act of 1871 is constitutional the levee commissioners were trustees for the bondholders to collect all the special assessments and with the proceeds pay the bonds. If the act was unconstitutional the commissioners' duty was to collect the assessments on the lands of those who were estopped to claim this defence. The power of a court of equity to compel them to do their duty as trustees certainly cannot be questioned. But a court of equity is not compelled to act throuh a delinquent trustee, especially when there is collusion between the trustee and the persons indebted to his *cestuis que trustent*. It will give the relief directly whenever the nature of the case will permit it. This is such a case. The entire relief prayed may be obtained by a decree in the nature of a decree of foreclosure

and the usual sale by a master in pursuance thereof. This was the conclusion of Judge Drummond in granting the decretal orders of 1879 and 1880.

Neither is there any practical difficulty in carrying out the decree of the Court. The manner of giving relief is as simple as the foreclosing of a mortgage, which it entirely resembles. The Court directly, or through a master, will find the amounts of the several assessments on the several parcels of land and make a decree that if the several assessments are not paid by a certain day a master shall sell the lands as he would sell a parcel of land upon a foreclosure of a mortgage.

Fitch vs. Creighton, 24 How., 159, was precisely such a case. The Court enforced the lien of certain assessments for work on the streets against adjoining lot owners by directing a sale in default of payment within ten days, although the statute of the State provided a specific mode of enforcing the lien, holding that where a statute of a State gives a lien for work on the streets against the adjoining lot owner, though it may give a specific mode of enforcing that lien, a court of the United States will enforce such lien in a court of equity as the one appropriate to its jurisdiction.

Hagar vs. Reclamation District, 111 U. S., 701, is also on all fours with the case at bar. It was a suit by Supervisors of the District to obtain a decree that the assessments for reclamation works were liens upon the lands of the appellants and for their sale to satisfy charges. The case was removed to the United States Circuit Court and the decree of that court that the several sums assessed were valid liens upon the lands of the appellant on which they were levied and ordering the lands to be sold for payment of the amounts with interest and costs was affirmed by the Supreme Court of the United States.

Argument.

Tax Titles are no Defense.

THE ALLEGED TAX TITLES HELD BY THE SNY ISLAND LEVEE DRAINAGE COMMISSION.

Another claim of defense is: That a large portion of the lands on which complainants claim a lien were sold for State and county taxes, and purchased by the Sny Island Levee Drainage District, and deeds have been issued, and the district holds under them a superior title to the claim or right of complainants or any other person.

When it is borne in mind that this Sny Island Levee Drainage District was organized for the *sole purpose of repairing* the levee which the money of the bondholders constructed, this seems a strange claim to put forth in a court of equity! ! !

They first, without any right, appropriate the levee which the bondholders' money has built, and then buy up tax titles on the lands benefited by the levee for the purpose of cutting off the lien of the bondholders! !

There are several conclusive answers to this claim:

1st. The new district took possession of the old levee to repair and maintain it, and its rights and powers in the premises are in continuation of and subordinate to the original construction levee assessments. If there is any duty imposed on the new district to pay State and county taxes on lands protected by the levee, then it cannot thereby obtain any rights or liens upon these lands by letting the taxes go to sale and purchasing at such sale. It is settled law that a party whose duty it is to pay a tax cannot cut off another's right to whom he owes any duty or to which right his own claim is subordinate by allowing the land to be sold for taxes and bidding it in either in his own name or in the name of some other person for him.

Dubois vs. Campau, 24 M., 260, at p. 368: "It may be re-

garded as settled that one in possession of land, claiming it as his own, is bound to pay the taxes imposed upon it—certainly such as are imposed and become due during such possession; and that, by neglecting this duty, suffering the land to be sold for taxes, and bidding it in himself, he can acquire no title against anyone, such sale being based upon his own fault."

Lacey vs. Davis, 4 Mich., 140.
Whitney et al. vs. Gunderson, 31 Wis., 359.
Miller vs. Ziegler, 31 Kan., 417.

Bassett vs. Welch, 22 Wis., 176: One in possession when taxes accrued, and against whom they are assessed (taxes being assessable against the occupant), can acquire no title under a sale for such taxes.

This doctrine is especially applied to cases of mortgagors and purchasers of lands subject to mortgage.

Seppo vs. Gilbert, 26 Kan., 139: One who purchases real estate subject to a mortgage, takes possession and neglects to pay taxes, cannot acquire any title thereunder against the mortgagee from a third person who buys a tax title.

And see McAlpine vs. Zitner, 119 Ills., 273, cited below.

2nd. The purchase of tax titles generally by the district is *ultra vires*, and no claim under them can be asserted by it. The district has no legal capacity to acquire or receive and hold tax titles. It is not a municipal corporation, scarcely *quasi* municipal. It possesses only the limited powers conferred by the statute—to levy and collect repair and maintenance assessments. These when collected can only be applied to the payment of the cost of repair and maintenance. They cannot be diverted into a speculation in tax titles.

Argument.

Tax Titles are no Defense.

The Supreme Court of Illinois say: "A drainage district is recognized for a special limited purpose and is only authorized to raise funds for the specific objects for which it is formed and only by special assessments, which cannot exceed the benefits to the owner.

Badger vs. Inlet Drainage District, 141 Ills., 540.

3d. These alleged tax titles have no materiality in this case in any view that may be taken of them.

Complainants' bill is filed only to enforce the lien of the levee assessments. Their validity and amounts are the only questions in the case. The validity or priority of independent outstanding tax titles in third persons cannot be litigated in this suit. Such titles are mere legal titles and must be tried in a court of law.

On the other hand, if the district or land owners have purchased tax titles for the purpose of strengthening their record titles or mortgages, then they are subject to the lien if any of the original assessments.

Many adjudications support the proposition, but we cite only the illinois cases, for on this question they declare a rule of property and are conclusive in this case.

McAlpine vs. Zitzer, 119 Ill., 273 (1887), was a bill in equity to foreclose a mortgage executed by John Von Gunten to the appellants. Charles Von Gunten was made a party to the bill, which sought to set aside a tax deed. Charles Von Gunten, the son of John Von Gunten. purchased for an insignificant sum the tax titles to the premises and secured a tax deed to them, his father continuing to exercise proprietorship over them. During the suit the son quit claimed to Julia Zitzer, his sister. The Circuit

Argument.

Tax Titles are no Defense. Equities are with Complainants.

Court rendered a decree of foreclosure; on appeal to the Appellate Court the bill was dismissed as to the sister, but affirmed in all other respects, then this appeal was taken, when the judgment of the Appellate Court was reversed and that of the Circuit Court affirmed. Held, that as there as collusion between father and son, the tax sale can have no other effect "than if the mortgagor had, himself, been the purchaser at the tax sale, and we hold that the tax title is subject to the mortgage." Where there is no collusion, "mere legal titles are for trial and determination in courts of law," and independent legal titles which are paramount should not be drawn in controversy.

Citing Gage vs. Perry, 93 Ill., 176.
Bozarth vs. Landers, 113 Ill., 181.

The argument in 1st and 3d subdivisions of this head apply to all the alleged tax titles, as well to those held by individuals, as those in name of the District. If the Court should hold otherwise, inasmuch as the superiority of the tax titles, if legally acquired, over the lien of the levee assessments depends on the considerations above stated, the question is one of detail which should go to a master.

In conclusion, the cause is one where all the equities are on the side of the complainants. Their money built in great part this public work.

The defendants have constructed the levee with the money of complainants and other bondholders; repaired and maintained it; held continuous possession and protected their lands with it ever since it was completed. During this time they have grown crops of great value on their lands—on an average of one-half of those of 1880—

worth ten millions of dollars. The levee has not broken since 1888 and is now as solid and firm as a natural river bank. The lands which it protects are now among the richest and most fertile in the State and worth at least five million dollars!

Through the constitutional and statutory legislation which defendants procured under the expressed object of repairing and maintaining the levee they are receiving annually ample means to repair, maintain and preserve it. By disregarding the just claims of the bondholders they have, through lapse of time, escaped the payment of nearly one-half of the bonds. Why then should they not pay Mr. Palms' children the $350,000.00 and interest which is due them in honesty and good conscience? Their right is clear and the remedy is simple.

It is respectfully submitted, that the decrees of the United States Circuit Court for the Southern District of Illinois in Equity and of the United States Circuit Court of Appeals for the Seventh Circuit should be reversed, with costs, and that a decree should be granted by this Court;

(1) Declaring that the Act of the General Assembly of Illinois approved April 24, 1871, was constitutional and valid and the levee drainage assessments levied thereunder described in the bill were valid liens upon the land assessed as respects complainants' claim, or,

(2) If this Honorable Court shall decide that the said Act of April 24, 1871, was unconstitutional, that a decree should be entered in favor of complainants, declaring that certain of said assessments upon certain lands of certain defendants are valid as respects complainants, because of such acts of estoppel as shall be found and declared by this Honorable Court; and that

(3) The cause be remanded to the Circuit Court of the United States for the Southern District of Illinois in Equity for further proceedings in accordance with the opinion of this Honorable Court; and that

(4) In either case the cause be referred to a master to be appointed by this Honorable Court or by said Circuit Court, as this Honorable Court shall direct, to ascertain and report in detail the several amounts of said assessments, and the several descriptions of the lands upon which they are liens, which under the opinion of this Honorable Court should be applied to the payment of complainants' bonds, and that upon the coming in of said master's report and its approval by said Circuit Court a decree shall be entered in the cause declaring that the said several amounts so reported by the master or so much thereof as shall be approved by the Court are liens on the said lands respectively, and providing that in default of the payment thereof within a reasonable time to be named in said decree the said lands shall be separately sold thereunder at a master's sale for the satisfaction of the several amounts respectively assessed thereon and named in said decree with interest, and that complainants be at liberty to bid thereon at such sale.

HENRY M. DUFFIELD,
Counsel for Complainants.

EXHIBIT "A."

SCHEDULES OF LANDS AND ASSESSMENTS THEREON BELONGING TO SOME TYPICAL DEFENDANTS.

NOTE.—The Bound Book, Exhibit "A," has two series of page numbers, i. e., the first from page 1 to 133. *This is the second assessment.*

The second series begins with p. 1 following p. 133 and continues to the end of the volume, but is the *first assessment.*

The starred figures denote the pages of the *second series,* but *first assessment.*

The figures without stars denote the *first series,* but *second assessment.*

SOME OF THE DEFENDANTS WHO WERE PETITIONERS FOR FIRST ASSESSMENT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
M. M. Aldrich.....	S. W.....	6	5	7	$309 66	$310 94	$620 60	*41 43	2	Admits the fact. Answer of J. Wheelock et al., pp. 55-40.
	W. ½ N. E.....	7	5	7	68 45	97 09	165 54	*42 44		
Melville D. Massie....	E. ½ S. W.....	7	5	6	436 00	130 40	566 40	*54 56	35	Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-40.
	S. ½ S. E. S. W.....	17	5	6	43 87	13 15	57 02	*55 57		
	S. W. S. W.....	17	5	6	162 19	48 54	210 73	*55 57		In Compt's testimony, Record, p. 96.
	10 acres S. side N. E. N E.	19	5	6	218 00	16 30	234 30	*56 58		
	W. ½ N. E.....	19	5	6	436 00	130 40	566 40	*56 58		
	N. W. N. W.....	20	5	6	88 00	26 40	114 40	*57 59		
	S. W. N. W.....	20	5	6	218 00	65 20	283 20	*57 59		
	N. W. S. E. except 10 acres on N. side.....	26	5	7	194 34	53 46	247 80	*50 52		
	N. pt. S. W. S. E.....	26	5	7	60 82	13 52	74 34	*50 52		
Samuel M. Spencer....	S. ½ S. W. E. of Sny...	18	4	7	311 95	90 30	402 25	*26 28	50	Admits the fact. Answer of J. G. Wheelock et al., Record, pp. 55-40.
	43 16-100 acres S. E. cor. N. W. ¼.....	19	4	7	1,153 38	344 97	1,498 35	*27 28		Compt's testimony, Record, p. 74.
	N. W. ¼ S. of Wabash Ry.....	19	4	7	1,153 38	344 97	1,498 35	*27 28		

SOME OF THE DEFENDANTS WHO WERE PETITIONERS FOR SECOND ASSESSMENT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Norman Brown.....	W. ½ N. W.....	10	7	5	436 00	130 40	566 40	*83	87	6 Admits the fact. Answe
	S. E. N. W.....	10	7	5	218 00	65 20	283 20	*84	87	of J. G. Wheelock et al.
	S. W.....	10	7	5	872 00	260 80	1,132 80	*84	87	Record, pp. 55-40.
Charles N. Clark....	120 acres S. End S. E.	4	5	7	811 13	242 53	1,053 66	*40	42	7 Admits the fact. Answe
	N. E.....	9	5	7	679 91	230 26	910 17	*43	44	of J. G. Wheelock et al.
	S. E.....	9	5	7	781 96	234 91	1,016 87	*43	45	pp. 55-40.
	Und. ½ S. W.....	2	7	5	872 00	260 80	1,132 80	*80	83	Compt's testimony, Re
	Und. ½ S. E.....	2	7	5	872 00	260 80	1,132 80	*84	83	ord, p. 60.
	Und. ½ N. E.....	11	7	5	872 00	260 80	1,132 80	*84	83	
	Und. ½ N. W.....	11	7	5	872 00	260 80	1,132 80	*84	83	

SOME OF THE DEFENDANTS WHO WERE SIGNERS OF TRUST DEEDS.

Richard H. Baker....	S. ½ S. W. S. E.....	6	4	7	90	27	1 17	*21	22	3 Admits the fact. Answe
	N. E. S. W.....	12	4	8	218 00	65 20	283 20	*13	13	of J. G. Wheelock et al.
	W. ½ E. ½ N. W.....	7	4	7	325 03	97 21	422 24	*21	23	Record, pp. 55-41.
	N. E. N. W. S. W.....	12	4	8	54 50	16 30	70 80	*13	13	Copy of Trust Deed re
	E. 10 acres S. ½ W. ½ N W.....	7	4	7	338 66	99 64	438 30	*22	23	ferred to p. 499, no printed.
	S. E. N. W. S. W.....	12	4	8	54 50	16 30	70 80	*13	13	
	Lot 1 E. side S. W.....	7	4	7	381 50	114 10	495 60	*22	23	
	W. ½ N. W. S. W.....	12	4	8	109 00	32 60	241 60	*13	13	
	Lot 2 mid. sub. S. W....	7	4	7	436 00	130 40	566 40	*22	23	
	S. W. S. W.....	12	4	8	145 35	43 47	188 82	*13	13	
William H. Gray.....	S W.....	24	6	6	701 36	209 76	911 12	*70	72	19 Admits the fact. Answe
	N. W.....	25	6	6	854 72	255 63	1,110 35	*70	72	of J. G. Wheelock et al.
	N. W.....	19	6	5	976 90	292 16	1,269 06	*73	76	Record, pp. 55-41.
										Testimony, Record, p. 277
William D. Shinn.....	N. W. ¼.....	30	6	5	872 00	260 80	1,132 80	*75	78	55 Admits the fact. Answe
	N. E. ¼.....	25	6	6	872 00	260 80	1,132 80	*70	72	of J. G. Wheelock et al.
	S. W. ¼.....	36	6	6	872 00	260 80	1,132 80	*71	74	Record pp. 55-41.

SOME OF THE DEFENDANTS WHO PETITIONED FOR ORGANIZATION OF SNY ISLAND LEVEE DRAINAGE DISTRICT.

NAME OF DEFENDANTS AND PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Range.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Isaac Barton	S. E.	29	6	5	533 17	159 45	692 62	*75 78	5	Admits the fact. Answer of J. G. Wheelock et al., pp. 55-41.
	E. ½ N. E.	32	6	5	654 00	195 00	849 00	*76 79		
	Und. ½ S. E.	3	6	6	872 00	260 80	1,132 80	*65 67		
	N. E. N. W.	10	7	5	217 99	65 19	283 18	*83 86		
	W. ½ N. W. S. W.	3	7	5	872 00	260 80	1,132 80	*81 84		
	N. ½ S. E.	10	7	5	872 00	260 80	1,132 80	*84 87		
	N. E. ¼	26	6	6	857 72	256 54	1,114 26	*70 73		
Ozias M. Hatch	N. E.	25	4	8	872 00	260 80	1,132 80	*19 19	22	Admits the fact. Answer of J. G. Wheelock et al., pp. 55-41.
	N. W.	25	4	8	872 00	260 80	1,132 80	*19 19		
	N. E.	4	6	6	872 00	260 80	1,132 80	*65 68		

SOME OF THE DEFENDANTS WHO WERE MADE PARTIES TO SNY ISLAND LEVEE DRAINAGE DISTRICT PROCEEDINGS.

J. W. Boyd	S. W. N. E.	6	5	6	221 37	66 20	287 57	*52 54	4	Record, p. 34.
	S. E. N. E.	6	5	6	100 94	30 20	131 14	*52 54		Record, p. 101.
	E. ½ N. pt. W. ½ S. W.	6	5	6	154 23	46 12	200 35	*52 54		
	N. pt. E. ½ S. W.	6	5	6	209 73	62 72	272 45	*52 54		
	W. ½ S. E.	6	5	6	436 00	130 40	566 40	*53 55		
George W. Wells	S. pt. E. ½ N. W.	18	7	4	42 82	12 81	55 63	*93 96	66	Record, p. 36.
	E. ½ N. E. S. W.	18	7	4	16 34	4 89	21 23	*94 97		Record, p.101.
John H. Webster	S. pt. S E.	18	7	4	87 72	34 25	121 97	*94 97	67	Record, p. 36.
	N. E. pt. N. E.	19	7	4	545 33	163 33	708 66	*94 97		Record, p. 101.

SOME OF THE DEFENDANTS WHO ACQUIRED TITLE FROM PETITIONERS FOR FIRST AND SECOND ASSESSMENTS AND FOR THE ORGANIZATION OF SNY ISLAND LEVEE DRAINAGE DISTRICT.

DEFENDANT'S NAME.	NAME OF PETITIONERS.	Description of Lands in Exhibits "A" and "X."	Sec.	Tp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
bner V. Wills	James M. Spencer	28 67-100 acres N. of Ry. N. E. ¼	23	4	8	950 64	284 32	1,234 96	*18	18	64	Record, p. 28.
		8 52-100 acres N. side N. W. ¼	23	4	8	839 02	250 93	1,089 95	*18	18		Record, p. 124.
oel K. Scarborough	James M. Spencer	S. ½ S. W.	24	4	8	872 00	260 80	1,132 80	*19	19		Record, p. 28.
		N. E. ¼	25	4	8	872 00	260 80	1,132 80	*19	19		Record, p. 254.
		N. E. ¼	26	4	8	872 00	260 80	1,132 80	*19	19		
		N. W. ¼	26	4	8	860 01	253 53	1,113 54	*19	20		
		S. W. ¼	26	4	8	267 97	80 15	348 12	*19	20		
		S. E. ¼	26	4	8	885 62	264 87	1,150 49	*19	20		
acob H. Dickason	N. S. Rouse	N. W. N. E.	27	4	8	187 53	39 03	226 56	*19	20	11	Record, p. 27. Record p. 146.

SOME OF THE DEFENDANTS WHO HAVE ACQUIRED TITLE SINCE DATE OF PETITION FOR SNY ISLAND LEVEE DRAINAGE DISTRICT, JAN. 26th, 1880.

oel L. Doud		S. W. N. E.	26	4	7	45 46	10 63	56 09	*30	32	12	Record, p. 37.
		N. W. S. E.	26	4	7	52 78	15 92	68 70	*31	32		Record, p.313.
		N. E. S. E.	32	4	7	218 00	65 20	283 20	*35	36		
William P. Pryor		N. ½ N. W.	12	6	6	70 67	21 17	91 84	*67	70	44	Record, p. 38.
		S. ½ N. W.	12	6	6	174 90	52 33	227 23	*67	70		Record, p. 319.
Charles Robb		S. E. S. W.	26	5	6	3 49	1 04	4 53	*59	61	46	Record, p. 38.
		N. ½ N. E. N. W.	35	5	6	54 28	16 13	70 41	*62	64		Record, p. 318.
		N. ½ N. W. N. W.	35	5	6	72 08	21 55	93 63	*63	65		
		S. ½ N. W. N. W.	35	5	6	101 69	30 41	132 10	*63	65		

POOR COPY

SOME OF THE DEFENDANTS WHO ACQUIRED TITLE FROM SIGNERS OF TRUST DEEDS.

DEFENDANT'S NAME.	SIGNERS OF TRUST DEEDS.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
Daniel C. Bates	R. M. Atkinson	20 acres W. side E. ½.	13	5	7	1,744 00	521 60	2,265 60	*44 46	4	Record, p. 287.
Wm. P. Lovett	R. M. Atkinson	76 acres S. pt. N. W.	13	7	5	782 95	234 18	1,017 13	*85 88	31	Record, p. 196.
		S. W. ¼	13	7	5	872 00	260 80	1,132 80	*85 88		

SOME OF THE DEFENDANTS WHO HAVE TAKEN TITLE BY DEEDS RECOGNIZING THE LEVY OF THE ASSESSMENTS.

M. Alger	S. E. Und. ½	8	4	8	872 00	260 00	1,132 80	*11 11	1	Record, p. 40.
	W. ½ S. W.	9	4	8	872 00	260 80	1,132 80	*11 12		Transcript, p. 580.
	Lots 12 and 13, W. ½ N. W.	16	4	8	436 00	130 40	566 40	*15 16		
	E. ½ N. E.	17	4	8	401 39	120 04	521 43	*17 17		
	11 99-100 acres N. W. Cor. N. E.	17	4	8	218 00	65 20	283 20	*17 17		
Louis Green	S. W.	32	4	7	872 00	260 80	1,132 80	*34 36	19	Record, p. 40. Transcript, p. 580.
Christopher D. Greene	W. ½ S. W.	28	5	6	436 00	130 40	566 40	*60 62	20	Record, p. 40. Transcript, p. 580.

SOME OF THE DEFENDANTS WHO ARE HEIRS AT LAW OF PERSONS ESTOPPED.

DEFENDANT'S NAME.	ANCESTOR'S NAME.	Description of Lands in Exhibits "A" and "X."	Sec.	Twp.	Rge.	Amount of 1st Assess.	Amount of 2d Assess.	Amount of Total Assess.	Page of Ex. "A."	Page of Ex. "X."	Referred to in Proofs.
B. Atkinson	R. M. Atkinson	N. E. Und. ½	14	5	7	872 00	260 80	1,132 80	*44 46	1	Record, p. 260.
		Frac. S. W. Und. ½	22	5	7	231 57	49 45	281 02	*47 49		
		E. E. Und. ½	22	5	7	752 07	267 17	1,019 24	*47 49		
		N. E. Und. ½	19	6	5	608 76	182 06	790 82	*73 76		
		S. W. S. W. Und. ½	19	6	5	154 99	46 35	201 34	*73 76		
		S. E. Und. ½	19	6	5	804 42	240 60	1,045 02	*73 76		
		N. E. Und. ½	7	6	6	840 22	240 53	1,080 75	*66 68		
		N. W. N. E.	11	6	6	218 00	65 20	283 20	*67 69		
		S. ½ N. E.	11	6	6	342 91	102 55	445 46	*67 69		
		S. W. Und. ½	30	7	4	438 35	131 50	569 85	*101 101		
Harry Higbee		S. ½ S. W.	5	5	6	5 70	1 70	7 40	*52 54	24	Record, p. 270.
		N. ½ N. W.	8	5	6	147 22	44 35	191 57	*54 56		
		N. E.	29	5	6	872 00	260 80	1,132 80	*60 62		
		S. W.	29	5	6	872 00	260 80	1,132 80	*60 62		
		S. W.	33	5	6	872 00	260 80	1,132 80	*62 64		
		S. E.	31	5	6	744 08	222 54	966 62	*61 63		
		N. E.	32	5	6	872 00	260 80	1,132 80	*61 63		
		Section	31	7	4	1,646 59	556 67	2,203 26	*101 101		

EXHIBIT "B."

An Act to Provide for the Construction and Protection of Drains, Ditches, Levees and Other Works.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That whenever one or more owners or occupants of land shall desire to construct a drain or drains, ditch or ditches, across the lands of others, for agricultural and sanitary purposes, such person or persons may file a petition in the county court of the county in which the drain or drains, ditch or ditches, shall be proposed to be constructed, setting forth the necessity of the same, with a description of it or their proposed starting point, route and terminus, and if it shall be deemed necessary for the drainage of the land of such petitioners that a levee or other work be constructed, the petitioners shall so state, and set forth a general description of the same as proposed, and may pray for the appointment of commissioners for the construction of such work, pursuant to the provisions of this chapter.

Sec. 2. Such petition having been filed, as provided in the preceding section, the petitioners shall cause at least two weeks' notice to be given by posting notices in at least three of the most public places in each congressional township through which the drain or drains, ditch or ditches, levee or other works, is or are proposed to be constructed, or if the same shall not be inhabited, in the nearest inhabited township, and by publishing a copy thereof in some newspaper published in the county in which the petition is filed, at least once in each week for two successive weeks, or if no newspaper is published in such county, then in the nearest newspaper published in the State. Such notice

shall state when and in what court the petition is filed, the starting point, route and terminus of the proposed drain or drains, ditch or ditches, or levees, and if a levee or other work is intended to be constructed in connection therewith, shall so state, and at what term of court the petitioners will ask a hearing upon such petition.

Sec. 3. The county court in which such petition shall be filed may hear the petition at any probate or law term thereof, and may determine all matters pertaining thereto under this act, and may adjourn the hearing from time to time, or continue the case for the want of sufficient notice or other good cause.

Sec. 4. In case the drain or drains, ditch or ditches, levee or other work proposed to be constructed shall pass through or over, or be constructed upon lands lying in different counties, the petition may be filed in the county court of either of such counties.

Sec. 5. On the hearing of any petition filed under the provisions of this chapter, all parties through or upon whose land any of the proposed work may be constructed, or whose land may be damaged or benefited thereby, may appear and contest the necessity or utility of the proposed work, or any part thereof, and the contestants and petitioners may offer any competent evidence in regard thereto. If it shall appear to the court that the proposed drain or drains, ditch or ditches, levee or other work is or are necessary, or will be useful for the drainage of the lands proposed to be drained thereby for agricultural and sanitary purposes, the court shall so find, and appoint three competent persons as commissioners to lay out and construct such proposed work. In case the lands to be drained shall be situated in different counties, not more than two of the commissioners shall be chosen from any one of such coun-

ties. If the court shall find against the petitioners, the petition shall be dismissed at the cost of the petitioners.

Sec. 6. Before entering upon the duties of their office, such commissioners shall take and subscribe an oath faithfully to discharge the duties of their office without favor or partiality, and to render a true account of their doings to the court by which they were appointed, whenever required by law or by the order of the court.

Sec. 7. They shall elect one of their number chairman, and may elect one of their number or some other person as secretary.

Sec. 8. A majority of the commissioners shall constitute a quorum, and a concurrence of a majority of their number in any matter within their duties shall be sufficient.

Sec. 9. As soon as may be after their appointment, or within such time as the court may direct, the commissioners shall examine the land of the petitioners proposed to be drained, and the lands over or upon which the work is proposed to be constructed, and inquire and determine:

1. Whether the starting point, route and terminus of the proposed drain or drains, ditch or ditches, and if a levee or other work is proposed, the proposed location thereof, is or are in all respects proper or most feasible, and if not, what is or are so.

2. The probable cost of the proposed work, including all incidental expenses, and the expenses of the proceeding therefor.

3. What lands will be injured thereby, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of the proposed work.

4. What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefits will equal or exceed the costs of constructing such work, including all incidental expenses and costs of the proceeding.

Sec. 10. If the commissioners shall find that such costs and expenses are more than equal to the benefits there will be bestowed upon the land to be benefited, they shall so report, and the proceeding shall be dismissed at the cost of the petitioners.

Sec. 11. If the commissioners shall find that the proposed work or such portion of the same as will be satisfactory to the petitioners, can be done at a cost and expense not exceeding such benefits, they shall proceed to have the proper surveys, profiles, plans and specifications thereof made, and shall report their conclusions and a copy of such surveys, profiles, plans and specifications to the court which appointed them.

Sec. 12. The commissioners shall not be confined to the point of commencement, route or terminus of the drains or ditches, or to the number, extent or size of the same, or the location, plan or extent of any levee or other work to that proposed by the petitioners, but shall locate, design, lay out and plan the same in such manner as they shall think will drain the petitioners' land with the least damage, and greatest benefits of all lands to be affected thereby, and any plans proposed by such commissioners may, on the application of any person interested, or of the commissioners, be altered upon the order of the court, in such manner as shall appear to the court to be just.

Sec. 13. Upon the report of the commissioners being filed with the clerk of the court appointing such commissioners, they shall cause notice to be given in the same manner as is provided in section two of this chapter, which

notice shall state the time of filing such report, and upon what day application will be made for the confirmation of such report, at which time all persons interested may appear and contest the confirmation thereof, or that the same ought to be modified in any particular, and may offer any competent evidence in support thereof.

Sec. 14. If, upon the hearing, the court shall be of opinion that the objections are not well taken, or if no objections shall be made, it shall order the confirmation thereof. If it shall appear that the same ought to be modified, and the court shall be sufficiently informed in the premises, it shall modify the same to conform to the equities in the premises; or if not sufficiently informed, it shall order the commissioners to review and correct their report, and may make specific directions in what respect they shall reform their report. And the court may make all necessary orders in the premises, either for the continuance of the hearing, or other lawful purpose.

Sec. 15. If the report is referred back to the commissioners for amendment, the court may fix a day when the commissioners shall again present their report, in which case the hearing shall stand adjourned to that day, and no further notice shall be required thereof. If no day shall be fixed for such report, the cause shall be continued to the next term of court, when it shall stand for hearing.

Sec. 16. When the report of the commissioners shall be confirmed, the court may impannel a jury of twelve men competent to serve as jurors, who shall be sworn to faithfully and impartially perform the duties required of them to the best of their understanding and judgment, and to make their assessment of damages and benefits according to law; or the court may direct that a jury be impanneled before a justice of the peace for the assessment of damages and benefits, in which case the commissioners may apply

to any justice of the peace in the county, who shall immediately, without the formality of any written application, proceed to summons and impannel a jury of six men competent to serve as jurors, who shall be sworn in the same manner as is above provided in case of a jury impanneled by the court in which the proceeding is pending, and the justice shall enter upon his docket a minute of such proceeding before him and the names of the jurors.

Sec. 17. In either case the jurors shall elect one of their number as foreman, and shall proceed to examine the land to be affected by the proposed work, and ascertain to the best of their ability and judgment the damages and benefits which will be sustained by, or will accrue to, the land so affected by the construction of the proposed work, and shall make out an assessment roll, in which shall be set down in proper columns the names of owners, when known, a description of the premises affected, in words or figures, or both, as shall be most convenient, the number of acres in each tract, and if damages are allowed, the amount of the same, and if benefits are assessed, the amount of the same, and in case damages are allowed to, and benefits assessed against, the same tract of land, the balance, if any, shall be carried forward to a separate column for damages or benefits, as the case may be.

Sec. 18. In making such assessment the jury shall award and assess the damages and benefits in favor of and against each tract separately, in the proportion in which such tract of land will be damaged or benefited; and in no case shall any tract of land be assessed for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it will be benefited by the proposed work, according to the best judgment of the jury.

Sec. 19. Whenever it shall appear to the jury that a drain, ditch, levee, or other work has been, in whole or in

part, constructed for the purpose of draining any land to be affected by the work proposed under this chapter, and such work shall be found to be of benefit to such lands, and any of the lands to be benefited have borne any part of the expense of such work, either pursuant to an assessment or otherwise, the jury may allow to the owner of such land, and deduct from the assessment which they may make against the same, the amount of the expense of such work so borne by such lands, or such part thereof as will make an equality of burdens and benefits as between the several owners of lands benefited. (See also Sec. 100.)

Sec. 20. When the jury shall have completed their assessment of damages and benefits, they shall fix a time and place when and where they will attend, in case a jury was impanneled by the court in which the petition is filed, before some justice of the peace in the county, where some part of the land affected is situated, or if the jury was impanneled by a justice of the peace, before the same justice for the correction of their assessment; and the commissioners or the jury shall give at least ten days' notice of such time and place by posting notices, as required in section two of this chapter, and by causing a copy of such notice to be sent by mail, addressed to each owner or occupant of land allowed for damages, or assessed for benefits, whose name and residence is known to the commissioners. The affidavit of any credible person that he deposited such notice in the postoffice, addressed to the owner or occupant named, at his place of residence, postage paid, shall be sufficient evidence of the sending of such copy of notice pursuant to this section.

Sec. 21. The jury shall appear at the time and place appointed, and shall hear all objections that may then and there be made by the owners or occupants of any lands which may be allowed damages, or assessed for benefits, or by the commissioners, to the allowance of damages to,

or assessment of benefits against any tract of land, and shall make such correction as shall seem to them just, and shall adjust such assessment so as to make the same just and equitable.

Sec. 22. At such hearing the justice of the peace shall preside, and may compel the attendance of witnesses and enforce order in the same manner as in other cases before justices of the peace; and in case any juror impanneled shall fail to appear, may attach him for contempt, or may impannel another in his stead, and may at any time during the proceedings, in making or considering their assessment, impannel jurors in the place of any who shall refuse or fail to act, and administer to such jurors the oath required by section sixteen of this chapter.

Sec. 23. If no objection shall be made to the assessment at the time and place so appointed to hear objections, or when found correct, or corrected upon the hearing, the jury shall confirm such assessment, which shall be certified by the foreman of the jury and delivered to the commissioners, who shall return the same to the next term of the court, in which the petition shall have been filed, and the same shall stand for hearing at that term, or may, for good cause, be continued.

Sec. 24. The commissioners, or any person who shall have made objections to such assessment, may appeal from the finding of the jury to the court in which the assessment is returned by giving notice of his or their intention to take such appeal, within ten days after such confirmation by the jury, and filing with the clerk of such court his or their bond, payable to the opposite party, with such security and in such an amount as shall be approved by the clerk, conditioned to pay all costs that may accrue by reason of such appeal; and if the appeal is by an owner or occupant of land assessed for benefits, to pay such an amount as shall

be found against him on account of benefits to his land by reason of such work.

Sec. 25. The trial upon appeal may be in the same manner as upon other appeals from justices of the peace, and in case the assessment of damages or benefits shall be changed from that returned to the court, the court shall cause the assessment roll to be aended to conform thereto.

Sec. 26. When the assessment roll shall have been corrected as aforesaid, or in case no correction shall be required to be made, the court shall confirm the same, and cause it to be spread upon the records, and appeal or writ of error shall be allowed therefrom.

Sec. 27. At the time of confirming such assessment it shall be competent for the court to order the assessment of benefits to be paid in installments of such amounts and at such times as will be convenient for the accomplishment of the proposed work, otherwise the whole amount of such assessment shall be payable immediately upon such confirmation, *and shall be a lien upon the lands assessed until paid.*

Sec. 28. Immediately after the entry of such confirmation by the court, the clerk shall make out and certify to the commissioners a copy of such assessment roll, and shall also make out and deliver to the commissioners separate copies of the same, pertaining to the lands situated in different counties, which shall be recorded in the recorder's office of the respective counties in which the lands are situated, and shall be notice of the lien thereof to all persons.

Sec. 29. The commissioners, upon receiving such certified copy of such assessment, may proceed to collect the same, or any installment thereof, or they may certify such assessment, or any installment thereof, which they may be entitled to collect at the time, to the county clerk of the

county in which the lands assessed may be situated, who shall extend the same, in a separate column, upon the proper tax books for the collection of state and county taxes, and such assessment or installment thereof so extended *shall be collected and enforced in the same manner as state and county taxes; provided*, the owner, agent or occupant of any land through or on which any drain, ditch, or levee shall be constructed shall have the right, under the direction of said commissioners, within such time as they shall prescribe, to construct such drain, ditch or levee, or any part thereof, at his own cost; and in case he shall so construct the same, he shall be allowed for the value thereof upon his assessment.

Sec. 30. In case the assessment for benefits shall be payable in installments, such installments shall draw interest at the rate of ten per centum per annum from the time they shall become payable till they are paid, and such interest may be collected and enforced as part of the assessment.

This section was amended in 1872 so as to make installments draw interest from the date of the assessment, and giving more fully the power to assess for interest each year.

Sec. 31. When the commissioners shall have elected to collect any assessment or installment thereof themselves, or shall not have caused the same to be extended upon the state and county tax books, and any assessment or installment shall be due and uncollected, and as often as any installment shall become due, and be uncollected at the time for making return of the tax books, for the collection of state and county taxes next succeeding the time of the receipt of the certified copy of the assessment by the commissioners, or the falling due of any installment, the commissioners may return a certified list of such delinquent lands, with the amount due thereon, to the officer who shall be authorized by law to receive the return of the books for

the collection of state and county taxes in the counties, or respective counties, where the lands are situated, who shall proceed to collect and enforce the same in the same manner as other taxes or special assessments are enforced, and shall pay over the amount so collected to the commissioner(s).

Sec. 32. If three months shall not intervene between the time of the delivery of an assessment warrant to the commissioners, or the falling due of the last of several installments upon any such warrant, and the time for making return of tax books for the collection of state and county taxes in that year, the commissioners may make their return at or before the time for making such returns in the succeeding year.

Sec. 33. The commissioners appointed by virtue of this chapter shall not collect or receive any money for the purposes therein specified until they shall have given bond, payable to the people of the State of Illinois, for the use of all persons interested, in a sum not less than twice the amount of the assessment for benefits, payable in any one year, with such security as shall be approved by the judge of the court, conditioned for the faithful application of all moneys that may be received by them as such commissioners, and to make due account thereof to the court whenever required, which bond shall be filed in the court in which the proceedings are had. The court may require additional bond from time to time.

Sec. 34. The commissioners, when appointed and qualified pursuant to this chapter, may do any and all acts that may be necessary in and about the surveying, laying out and constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee, or other work, for which they shall have been appointed, including all necessary bridges, crossings, embankments, protections, dams and side-drains, and may employ all neces-

sary agents and servants and enter into all necessary contracts and sue and to be sued.

Sec. 35. The commissioners may borrow money not exceeding in amount the amount of assessment unpaid at the time of borrowing for the construction of any work which they shall be authorized to construct, and may secure the same by notes or bonds, bearing interest at a rate not exceeding ten per centum per annum, and not running beyond one year after the last assessment, on account of which the money is borrowed, shall fall due, which notes or bonds shall not be held to make the commissioners personally liable for the money borrowed, but shall constitute a lien upon the assessment for the repayment of the principal and interest thereof.

Sec. 36. When it shall appear that a drain, ditch, levee or other work has been, in whole or in part, constructed for the purposes of draining any land to be benefited by the construction of any work which they shall be authorized to construct, and the whole, or any part of the cost of such work, shall have been paid or incurred by any person or corporation, if such work shall be valuable for the purposes of draining the land, and can be made useful therefor by such commissioners according to their plans, they may allow and pay to such person or corporation the actual value thereof for such purposes. (See also Sec. 83.)

Sec. 37. All damages over and above the benefits to any tract of land shall be payable out of the amounts assessed against other lands for benefits, and shall be paid or tendered to the owner thereof before the commissioners shall be authorized to enter upon his land for the construction of any work thereon. In case the owner is unknown, or there shall be a contest in regard to the ownership of the land, or the commissioners cannot, for any reason, safely pay the same to the owner, they may deposit the same with

the clerk of the court, and the court may order the payment thereof to such party as shall appear to be entitled to the same.

Sec. 38. The court may at any time remove any commissioner appointed by it, and appoint another in his place, and may fill all vacancies by death, resignation, removal or otherwise, and may appoint a new commission, or authorize the commissioners appointed to repair or cleanse any work, ditch or drain that shall have been constructed.

Sec. 39. Any one or more new assessments may be made in the manner hereinbefore provided, on the suggestion of the commissioners, or any owner or occupant of lands affected by any work authorized by this chapter, either to supply any deficiency in any other assessment, or to repair, alter, enlarge, cleanse, protect or maintain any drain, ditch, levee or other work constructed by virtue of this chapter.

Sec. 40 The commissioners shall receive for their services the sum of three dollars per day for each day they shall be actually engaged in the business of their appointment. They shall fix the compensation of all other servants and agents.

Sec. 41. The commissioners shall, as often as once in each year after their appointment, and as much oftener as the court shall require, make a report to the court by which they were appointed, showing the amount of money by them collected, and the amount and kind of work done, and the manner in which the same is being done.

Sec. 42. When the cost of any proposed drain, ditch, levee or other work authorized by this chapter to be done will not exceed the sum of five thousand dollars, and will not extend through or into more than three congressional townships, the petition may, if the petitioners shall so elect, be filed with a justice of the peace in the county where the

land to be affected, or the major part thereof, is situated; and all the proceedings authorized by this chapter to be had in the county court in cases where the petition is filed in such caurt, may be had before such justice of the peace, and the assessment of damages and benefits shall be conducted before such justice in the same manner, as near as may be, as in cases commenced by petition before such county court, and appeals may be taken from the final judgment of the justice of the peace to the county court within the same time and in the same manner as appeals may be taken from the findings of the jury in cases commenced in the county court. And the assessment of benefits may be collected and enforced as in such cases before the county court.

Sec. 43. When the proceedings shall be had before a justice of the peace, the justice shall direct the commissioners of highways of the town or township, or in case the drain, ditch or other work shall be located in several towns or townships, the commissioners of the several townships, as a joint board, to lay out and construct such work, and perform the duties required of commissioners appointed under this chapter; and such commissioners of highways shall have all the power and authority and may perform all acts and discharge all the duties bestowed upon or required of commissioners appointed by the county court.

Sec. 44. If any commissioner of highways shall refuse or neglect to discharge any of the duties imposed upon him by virtue of this chapter, he shall, for every such refusal or neglect, be liable to any party aggrieved for all damages sustained by him, and, upon conviction, may be fined in any sum not exceeding one hundred dollars, and be removed from his office.

Sec. 45. Any person who shall wrongfully and purposely fill up, cut, injure, destroy, or in any manner impair

the usefulness of any drain, ditch or other work constructed under this chapter, or that may have been heretofore constructed, for the purpose of drainage or protection against overflow, may be fined in any sum not exceeding two hundred dollars, to be recovered before a justice of the peace in the proper county; or if the injury be to a levee, whereby lands shall be overflowed, he may, on conviction in any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, or imprisoned in the county jail not exceeding one year, or both, in the discretion of the court. All complaints under this section shall be in the name of the people of the State of Illinois, and all fines, when collected, shall be paid over to the proper commissioners, to be used for the work so injured.

Sec. 46. In addition to the penalties provided in the preceding section, the person so wrongfully and purposely filling up, cutting, injuring, destroying or impairing the usefulness of any such drain, ditch, levee or other work shall be liable to the commissioners having charge thereof for all damages occasioned to such work, and to the owners and occupants of land for all damages that may result to them by such wrongful act, which may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction.

Approved April 24, 1871.

EXHIBIT "C."

Abstract of Act of Legislature of Illinois, Approved May 29, 1877.

An Act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes and to provide for the organization of drainage districts.

Section 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly,* That drainage districts may be organized and established as hereinafter provided.

Sec. 2. Whenever a majority of the owners of lands, within a district proposed to be organized, who shall have arrived at lawful age, and who represent one-third ($\frac{1}{3}$) in area of the lands to be reclaimed or benefited, desire to construct a drain or drains, ditch or ditches, levee or levees or other work, across the lands of others for agricultural, sanitary or mining purposes, or to maintain and keep in repair any such drain or drains, ditch or ditches, levee or levees, heretofore constructed under any law of this State, such owners may file, in the county court of any county in which the greater part of the lands to be affected by said drain or drains, ditch or ditches, levee or levees, or other work proposed to be constructed, maintained or repaired, shall lie, a petition signed by a majority of the owners of said lands, within said district, proposed to be organized as aforesaid, setting forth the proposed name of said drainage district, the necessity of the same, with a description of its or their proposed starting points, route and terminus, and a general description of the lands proposed to be affected, with the names of the owners, when known, and, if

the purpose of said owners is the repair and maintenance of a ditch or ditches, levee or levees or other work, heretofore constructed under any law of this state, said petition shall give a general description of the same, with such particulars as may be deemed important, and may pray for the organization of a drainage district, by the name and boundaries proposed, and for the appointment of commissioners for the execution of such proposed work according to the provisions of this act. But that nothing in this section shall operate to prevent the organization of any drainage district entirely within one county, nor to deprive the county court of such county, of its jurisdiction of the subject matter of any petition filed in accordance with the provisions of this Act. *Provided* that the lands embraced in such drainage district shall be liable for any and all damages which may be sustained by any lands lying above such drainage district, by the construction of any levee, ditch or drain in such district under this act, and the commissioners of any drainage district, composed of lands lying next below another drainage district organized entirely in one county as aforesaid, shall have power to cause the lands lying in such district, entirely within one county, to be assessed in the manner prescribed by this Act for the assessment of benefits to pay all such damages to the lands lying in such lower district and to pay any and all increased costs and expenses of constructing any levee, ditch or drain in such lower district which may be necessary to carry off waters flowing from the higher district, and such lower district shall have the power to connect its levees, ditches, or drains with the levees, ditches or drains of such higher district, and said higher district shall have the power to connect its levees, ditches or drains with levees, ditches or drains of such lower district.

Abstract of Act of Legislature of Illinois, Approved May 29, 1877.

* * * * *

Sec. 28. Upon the organization of said drainage district the commissioners so appointed shall from thenceforth have power to contract and be contracted with, sue and be sued, plead and be impleaded, and to do and perform in the corporate name of said district, all such acts and things as may be necessary for the accomplishment of the purposes of this act.

The remainder of the act follows closely the provisions of the act of 1871. It is very lengthy—seventy sections—and counsel do not deem it necessary to print it in full.